ORIGINAL

IN THE SUPREME COURT OF OHIO

Sondra Anderson, Plaintiff-Respondent, v. Barclays Capital Real Estate Inc. d/b/a HomEq Servicing, Defendant-Petitioner.	: : : : : : : : : : :	Supreme Court Case No. 11-0908 On Review of Certified Questions From the United States District Court Northern District of Ohio, Western Division N.D. Ohio Case No. 3:09-cv-02335-JGC

MERIT BRIEF OF PETITIONER BARCLAYS CAPITAL REAL ESTATE INC. D/B/A HOMEQ SERVICING

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INTRODUCTION

The two certified questions in this case are essentially identical to two of the three questions that were previously certified, briefed, and orally argued to this Court in Case No. 2011-890, *State ex rel. Michael DeWine, Attorney General, v. GMAC Mortgage, LLC.* Four months after oral argument this past February, the *GMAC* case was stayed indefinitely pending GMAC Mortgage, LLC's bankruptcy proceedings. On the same day that it stayed the *GMAC* case, this Court decided that *this* case should no longer be held for *GMAC* and set the matter for briefing.

As it was in the *GMAC* case, this Court has been asked by the United States District Court for the Northern District of Ohio to determine whether the Ohio Consumer Sales Practices Act ("CSPA") applies to mortgage servicers like Petitioner Barclays Capital Real Estate Inc. d/b/a HomEq Servicing ("HomEq"). The Court has been asked to determine, first, whether servicing a residential mortgage loan constitutes a "consumer transaction" as defined in the CSPA. Second, the Court has been asked to decide whether entities that service residential mortgage loans are "suppliers *** engaged in the business of effecting or soliciting consumer transactions" within the meaning of the CSPA. HomEq respectfully submits that the answer to both of these questions is "no."

The CSPA does not apply to mortgage servicing because mortgage servicers are not selling anything to consumers and are not effecting or soliciting consumer transactions. Mortgage servicers enter the picture only after a real estate sale – not the sale of an item of good or services – between a buyer and seller has closed and a mortgage loan is in place. Mortgage servicers enter into contracts with the holders of residential mortgage loan notes – not with individual borrowers – to service the loans

on behalf of, and for the benefit of, the noteholders. The statutory definition of a "consumer transaction" in R.C. 1345.01(A) is limited to the transfer of "goods and services," and does not encompass the transfer of real estate. The definition also limits the reach of the CSPA to goods or services provided to an individual, thereby excluding services provided under contract with, and on behalf of, commercial entities. The Court should reject any invitation to judicially rewrite the CSPA and hold, instead, as is evident from the statute's plain language and legislative history, that the CSPA does not apply to mortgage servicers.

STATEMENT OF THE CASE AND FACTS

Before Barclays Capital Real Estate Inc. sold HomEq in September 2010, HomEq serviced residential mortgage loans. It did so pursuant to contracts called Pooling and Servicing Agreements. These agreements were not made between HomEq and any individual Ohio home buyers, but instead between HomEq and sophisticated entities that own mortgage loan notes, including securitization trusts established specifically to own the loans and sell interest (certificates) in them. Those noteholder entities – not the individual borrowers – contracted with HomEq to service the loans on their behalf.

The Pooling and Servicing Agreements ("PSAs") between HomEq and the noteholders are lengthy and complex commercial contracts that govern the terms and conditions under which HomEq is to service the residential mortgage loans so that the notes are timely and properly paid. Relevant excerpts of the PSA associated with Respondent Anderson's mortgage are included in the Appendix to this Merit Brief, as the Court directed in the *GMAC* case. *See* Entry, *State ex rel. DeWine v. GMAC*

Mortgage, LLC, Case No. 2011-0890 (Dec. 20, 2011).[1] The plain language of the PSA attests to the fact that HomEq undertakes its contractual duties as a servicer for the benefit of those holding the mortgage loan notes, not for the benefit of individual homeowners like Respondent. The PSA states: "*For and on behalf of the Certificateholders*, the Servicers shall service and administer the Mortgage Loans *** [.]" *See* PSA, Appx. A-23 (Emphasis added.)

The key factual allegations in Respondent Anderson's complaint against HomEq are set forth in the District Court's Certification Order. (Appx. A-50.) Anderson does not allege that HomEq solicited or originated her mortgage or made her a loan. Nor does she allege that HomEq ever owned or held the note associated with her mortgage. Rather, the allegations merely describe some of the tasks that HomEq undertook to service repayment of mortgage loan notes, *e.g.*, accepting and applying mortgage payments and other fees owed, resolving borrowers' questions and disputes about their mortgage loans, and purchasing home insurance as required by the note, if the borrower failed to do so. *See* Cert. Order at 2-3. (Appx. A-51-A-52.) The alleged tasks are entirely consistent with the conclusion that HomEq is acting on behalf of, and for the benefit of, the noteholder – not the borrower. While on occasion HomEq likely answered a question or resolved a dispute in favor of the borrower, or executed an agreement that avoided a default on the part of the borrower, these activities do not negate the fundamental purpose of mortgage servicing, which is to facilitate mortgage loan repayment for the benefit of the noteholders. HomEq's role as mortgage servicer is to

[1] A complete copy of the PSA, which was a deposition exhibit in the case before the certifying court, is available on the U.S. Securities and Exchange Commission's EDGAR website. *Available at:* http://www.sec.gov/Archives/edgar/data/1328228/000091412105001167/ms839429ex4.txt.

see that the mortgage payments are properly made and applied, and to avoid borrower defaults so that the noteholders are repaid.

HomEq moved to dismiss Anderson's CSPA claim in the certifying court, arguing that mortgage servicers are not "suppliers" and that mortgage servicing is not a "consumer transaction" under the CSPA. Holding in abeyance his ruling on the CSPA issues, Judge Carr issued the Certification Order on May 24, 2011, and designated HomEq as the moving party. Just two days earlier, Judge Zouhary also certified to this Court in the *GMAC* case the questions of whether mortgage servicers are "suppliers" engaged in "consumer transactions" under the CSPA. Judge Zouhary also certified to this Court the questions whether the *prosecution of a foreclosure action* by a mortgage servicer constitutes a "consumer transaction" or renders the mortgage servicer a "supplier" under the CSPA. The questions certified here by Judge Carr, however, *do not implicate any foreclosure activities – only mortgage servicing activities.* For the reasons set forth below, the Court should answer both certified questions in the negative and confirm that mortgage servicers are not within the purview of Ohio's CSPA.

ARGUMENT

I. ANSWER TO CERTIFIED QUESTION NO. 1: THE SERVICING OF A BORROWER'S RESIDENTIAL MORTGAGE LOAN DOES NOT CONSTITUTE A "CONSUMER TRANSACTION" AS DEFINED IN THE OHIO CONSUMER SALES PRACTICES ACT, R.C. § 1345.01(A)

A. This Court Applies Statutes As They Are Written, Resorting To Interpretive Aids Only When Needed To Resolve Ambiguities.

This Court adheres to its constitutional role in *applying* – not rewriting – the laws enacted by the General Assembly. As the Court previously noted in another certified-question case, the Court's "duty *** is to give effect to the words used in a statute, not to delete words used or to insert words not used." *Funk v. Rent-All Mart, Inc.*, 91 Ohio St.3d 78, 80, 2001-Ohio-270, 742 N.E.2d 127; *see also Kimble v. Kimble*, 97 Ohio St.3d 424, 2002-Ohio-6667, 780 N.E.2d 273, ¶ 5, citing *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40, 2001-Ohio-236, 741 N.E.2d 121 (noting the "fundamental principle of statutory construction that where the meaning of a statute is clear and definite, it must be applied as written.")

The Court has applied these principles in other cases concerning the meaning and scope of consumer-protection statutes. In *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, 910 N.E.2d 432, for example, the Court declined the Attorney General's invitation to hold that a statute governing odometer-disclosure violations is a strict-liability statute. *Id.* at ¶ 27. In doing so, the Court invoked its well-established rule that "if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation." *Id.* at ¶ 15 (internal quotation omitted.) This fundamental principle applies even to remedial statutes such

as the CSPA, which are subject to liberal construction – *when construction is necessary.* As this Court has noted, "there is no need to liberally construe a statute whose meaning is unequivocal and definite." *State ex rel. Auglaize Mercer Community Action Comm. v. Ohio Civil Rights Comm.*, 73 Ohio St.3d 723, 727, 654 N.E.2d 1250 (1995) (holding that a statute empowering state agencies to award attorneys' fees to prevailing parties after adjudications, even if it was a remedial statute subject to liberal construction, did not apply to the Ohio Civil Rights Commission because the Commission did not meet the plain terms of the statute's multiple alternative definitions of "agency.") The *Midway Motor Sales* and *Auglaize* cases demonstrate why the Court should decline the invitation of Anderson (and the State of Ohio as *amicus curiae)* to judicially rewrite the CSPA to bring mortgage servicers within its purview.

B. Mortgage Servicing Is A Collateral Service Associated With The Sale Of Real Estate And Is Not Subject To Ohio's Consumer Sales Practices Act.

The CSPA, by its own plain terms, defines a "consumer transaction" to include *only* "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible." R.C. 1345.01(A). Because real estate is neither a good, service, franchise, nor intangible, it has long been the rule that the CSPA "has no application in a 'pure' real estate transaction." *Brown v. Liberty Clubs, Inc.*, 45 Ohio St.3d 191, 193, 543 N.E.2d 783 (1989). Depending on the facts, of course, aggrieved purchasers of real estate may have other statutory or common-law remedies against their sellers, but as this Court confirmed in *Brown*, the CSPA does not apply to a pure real estate transaction.

Multiple Ohio courts have held that included within the "pure real estate" exclusion from the CSPA are "collateral service[s] associated with the sale of real estate."

See, e.g., Hurst v. Enterprise Title Agency, Inc., 157 Ohio App.3d 133, 2004-Ohio-2307, 809 N.E.2d 689, ¶ 34, jurisdiction declined, 103 Ohio St.3d 1464 (holding that escrow services were collateral to the real estate transaction and therefore not subject to the CSPA), quoting *Colburn v. Baier Realty & Auctioneers*, 11th Dist. No. 2002-T-0161, 2003-Ohio-6694, ¶ 13 (holding that an auctioneer's service in connection with the sale of real estate was a pure real estate transaction); *see also Hanlin v. Ohio Builders and Remodelers, Inc.*, 212 F.Supp.2d 752, 757 (S.D.Ohio 2002) (holding that "closing services" provided by a mortgage lender were "part and parcel of the real estate transaction" and therefore not subject to the CSPA.)

Two state and federal courts in Ohio very recently have confirmed the principle that collateral services associated with the sale of real estate are outside the purview of the CSPA. Just this past April, U.S. District Judge Graham from the Southern District of Ohio analyzed the collateral-service exception in a federal case related to the purchase of a home. *Milner v. Biggs*, S.D. Ohio No. 2:10-cv-904, 2012 WL 1188274 (Apr. 6, 2012). After discovering water damage in the home, the buyers brought various claims against the seller, the seller's real estate agents, the buyers' own real estate agents, the title company, and the home inspector. The buyers asserted CSPA claims against their agents, claiming that they committed unfair and deceptive acts in nearly a dozen different ways. Citing *Hurst* and *Hanlin*, *supra,* however, Judge Graham concluded that defendants' acts of "reviewing the purchase contract and closing documents, and arranging for the provision of home inspection and closing services that the purchase contract *** expressly required be performed" were "*part and parcel of the sale of the house*" and thus "outside the scope" of the CSPA. *Milner*, 2012 WL 1188274 at *12

(emphasis added). Accordingly, Judge Graham granted the defendants' motion for judgment on the pleadings as to the CSPA claims.

In late June 2012, Ohio's Eighth District Court of Appeals applied the collateral-service exception in a case that began as a foreclosure action brought by U.S. Bank against two homeowners, the Amirs. *U.S. Bank v. Amir*, 8th Dist. No. 97438, 2012-Ohio-2772. In their answer to the foreclosure complaint, the Amirs claimed that they were the victims of a property-flipping scheme, under which they were induced to purchase the property through fraudulent misrepresentations, false loan documents, and a fraudulent appraisal. The Amirs asserted CSPA claims against the property appraiser and title searcher, but the court of appeals held that the trial court properly granted a directed verdict on these claims, saying "[t]he appraisal services performed by Hudak and the title services performed by Capuozzo were collateral services solely associated with the sale of real estate. Therefore, the claims involve a pure real estate transaction and the CSPA is not applicable." *Amir*, 2012-Ohio-2772, ¶ 43.

Mortgage servicing is akin to closing services, auctioneer services, escrow services, appraisal services, and title services – all of which Ohio courts have previously held are collateral to a pure real estate transaction and, therefore, not subject to the CSPA. *Accord Rico v. JP Morgan Chase Bank N.A.*, N.D. Tex. No. 3:10-cv-1643, 2011 WL 1792854 (May 10, 2011) ("Plaintiffs' objective was to purchase their residence. All ensuing loan servicings were incidental to that.") In each of these contexts, those accused of CSPA violations have had at least some interaction with individual purchasers of real estate and have rendered a service that may benefit the purchasers. In each of these contexts, however, Ohio courts have correctly determined that the allegedly deceptive or unfair acts were, as Judge Graham put it in *Milner*, "part and

parcel" of the pure real estate transaction, making them (pursuant to the CSPA's definition of "consumer transaction," and this Court's decision in *Brown*) clearly outside the purview of the CSPA. The same result should hold for mortgage servicers. Mortgage servicers like HomEq perform collateral services associated with the sale of real estate, and Ohio courts agree that such collateral services are not regulated by the CSPA.

C. Mortgage Servicing Is Not A "Consumer Transaction" Under The Plain Language Of R.C. 1345.01(A). Mortgage Servicing Is Performed For The Benefit Of The Noteholders With Whom HomEq Enters Into Pooling And Servicing Agreements And Does Not Constitute A "Transfer Of *** A Service *** To An Individual" Under R.C. 1345.01(A).

Even assuming that the collateral-services exclusion from the *Hurst, Colburn, Hanlin, Milner,* and *Amir* cases does not apply, there is another equally compelling reason why mortgage servicing is not a "consumer transaction" as that term is defined in R.C. 1345.01(A). Simply put, not every transaction involving an individual is a "consumer transaction" subject to the CSPA. Indeed, in the opening lines of the Act in R.C. Chapter 1345, the General Assembly carefully circumscribes the limited number of transactions that are "consumer transactions" subject to the CSPA, saying:

> (A) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, *to an individual for purposes that are primarily personal, family, or household,* or solicitation to supply any of these things.

R.C. 1345.01(A) (emphasis added). It is undisputed that mortgage servicing is not a "sale," "lease," "assignment," or "award by chance." It is also undisputed that no "item of goods," "franchise," or "intangible" is exchanged in the context of mortgage servicing. In order to qualify as a "consumer transaction," then, mortgage servicing must be a "transfer of *** a service *** to an individual for purposes that are primarily personal, family or household." It is not.

Mortgage servicing does not constitute a "transfer of *** a service *** to an individual" as R.C. 1345.01(A) requires. Mortgage servicers like HomEq enter into service agreements with noteholders, not with individual homeowners like Anderson. HomEq's mortgage service obligations are set forth in lengthy and complex commercial agreements, such as the attached PSA (Excerpted at Appx. A-17.) These agreements are between HomEq and *other sophisticated business entities* – the owners of the mortgage loan notes – not between HomEq and individual homeowners like Anderson. *See Anderson v. Barclays Capital Real Estate Inc. d/b/a HomEq Servicing*, N.D.Ohio No. 3:09-CV-2335, Second Amended Complaint, ¶ 16 (Aug. 10, 2010).

Anderson does not allege that HomEq originated her loan or that HomEq is a party to her note or mortgage. Nor does Anderson allege that HomEq ever owned or held the note. HomEq's agreement with the noteholder to service Anderson's mortgage may constitute a "transfer of *** a service" *to the noteholder*, but that does not equate to a "transfer of *** a service" to Anderson. Under the State of Ohio's administrative rules intended to define with "reasonable specificity" the acts and practices which violate the CSPA, "services" is defined as the "performance of labor for the benefit of another." Ohio Adm.Code 109:4-3-01(C)(2). As the plain language of Article III of the PSA states, HomEq performed mortgage services "*for and on behalf of the Certificateholders*" (emphasis added), not for the benefit of individual homeowners. *See* PSA (Appx. A-23.) While mortgage servicers may at times answer a borrower's questions about the status of their loan, or resolve a dispute in favor of the borrower, or execute an agreement that avoids a default on the part of the borrower, these activities do not negate the fundamental purpose of mortgage servicing, which is to facilitate mortgage loan repayment for the benefit of the noteholders.

Two well-reasoned opinions from Minnesota illustrate this principle. In *Rossbach v. FSB Mortgage Corp.*, Minn.Ct.App. No. C3-97-1622, 1998 WL 156303 (Apr. 7, 1998), the Court of Appeals of Minnesota concluded that a mortgage servicer was not subject to claims by a mortgagor under that state's Consumer Fraud Act. The mortgage servicer in *Rossbach*, like HomEq, "collected various escrow fees from [the homebuyer] including hazard insurance, property taxes, and private mortgage insurance (PMI) premiums and forwarded them to the requisite agencies." *Id.* at *2. Affirming the trial court's grant of summary judgment to the mortgage servicer on the plaintiff's consumer claim, the court of appeals explained that the mortgage servicer, which had acquired the servicing rights to the plaintiff's mortgage eight years after her home purchase, was "acting only as a facilitator of payments" and "did not provide services directly to *** [the borrower];" any service that the loan servicer "provided was according to the service contract and for the benefit of [the noteholder]." *Id.* at *3.

In another case, *Independent Glass Assn., Inc. v. Safelite Group, Inc.*, D.Minn. No. 05-238 ADM/AJB, 2005 WL 2093035 (Aug. 26, 2005), a federal judge in Minnesota followed *Rossbach* and held that no suit arose under Minnesota's Consumer Fraud Act against Safelite, which provides third-party administrator services to insurance companies for auto glass repairs, saying "Safelite provides the service for the benefit of the insurance companies, rather than the benefit of the car owner. *** Any 'services' Safelite performed as third party administrator were performed as an intermediary and for the benefit of its insurance company clients." *Safelite*, 2005 WL 2093035, at *7-8. Thus, even though the individual consumer victim of a broken windshield may enjoy some benefit from the third-party administrator's prompt and efficient processing of a claim – such as the ability to drive away quickly with a newly

repaired windshield – that is not sufficient to bring the third-party administrator within the purview of Minnesota's Consumer Fraud Act.

The same logic applies here, and the Court should adopt the reasoning of these Minnesota state and federal courts. Just as the services performed by Safelite were "for the benefit of its insurance company clients," the services performed by mortgage servicers like HomEq are for the benefit of their noteholder clients – the businesses with which they have contractual agreements. Thus, mortgage servicing does not constitute a "transfer of *** a service *** to an individual" as the definition of "consumer transaction" requires under the plain language of R.C. 1345.01(A).

Other recent decisions from beyond Ohio confirm the reasoning in *Rossbach* and *Safelite*, and hold that mortgage servicing is not performed in connection with a "consumer transaction." In *Salehi v. Wells Fargo Bank, N.A.*, E.D.Va. No. 1:11-cv-1323, 2012 WL 2119333 (June 11, 2012), for example, the plaintiff alleged that a mortgage servicer provided false statements of the amount due under a mortgage note and collected money that the plaintiff did not owe. The plaintiff alleged a claim against the mortgage servicer under Virginia's Consumer Protection Act, which provides, among other things, that it is unlawful for a supplier to employ "'deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction.'" *Id.* at *1, 5, quoting Va.Code Ann. § 59.1-200(A)(14)(2011). The district court dismissed the plaintiff's complaint for "fail[ing] to allege [that] the false statements to Plaintiff were made *in connection with a consumer transaction.*" *Id* at *6 (emphasis added.) Notably, like Ohio's definition of "consumer transaction," Virginia's embraces sales of goods or services "primarily for personal, family, or household purposes." *Id.*, quoting Va. Code Ann. § 59.1-198 (2011).

Other federal courts interpreting state consumer protection laws have reached similar conclusions. *E.g., Rico, supra,* 2011 WL 1792854 at *5 ("The record is clear that the objective of [Plaintiffs'] transaction was not to administer the loan, process payments, maintain and adjust an escrow account, or prepare all necessary documents to complete the loan; Plaintiffs' objective was to purchase their residence. *All ensuing loan servicing were incidental to that.* Accordingly, because Plaintiffs were attempting only to borrow money to pay for the Property, *** *they do not meet the classification of a 'consumer' under the Act.*") (Emphasis added); *In re G-Fees Antitrust Litigation,* 584 F.Supp.2d 26 (D.D.C. 2008) (holding that District of Columbia and Virginia consumer protection laws do not apply to corporations in the secondary mortgage market such as Fannie Mae and Freddie Mac because "plaintiffs are unable to allege that they are consumers of anything Fannie Mae provides.")

Accordingly, mortgage servicing is not a "consumer transaction" under the plain language of R.C. 1345.01(A). Mortgage servicing is performed for the benefit of the noteholders with whom HomEq enters into Pooling and Servicing Agreements, not for the benefit of individual homeowners, and mortgage servicing does not constitute a "transfer of *** a service *** to an individual" as the statutory definition requires.

II. ANSWER TO CERTIFIED QUESTION NO. 2: ENTITIES THAT SERVICE RESIDENTIAL MORTGAGE LOANS ARE NOT "SUPPLIERS *** ENGAGED IN THE BUSINESS OF EFFECTING OR SOLICITING CONSUMER TRANSACTIONS" WITHIN THE MEANING OF THE OHIO CONSUMER SALES PRACTICES ACT, R.C. 1345.01(C).

As explained above, mortgage servicing is not a "consumer transaction" under R.C. 1345.01(A) because it does not constitute a "transfer of *** a service *** to an individual" as the plain language of R.C. 1345.01(A) requires. Because the definition of

"supplier" in R.C. 1345.01(C) includes only those entities in the business of effecting or soliciting "consumer transactions," HomEq and other mortgage servicers are not "suppliers" under the plain language of the Act. Where there is no "consumer transaction," there can be no "supplier" under the plain meaning of R.C. 1345.01(C). Moreover, mortgage servicers also are not "suppliers" under the Act because they do not "effect" or solicit consumer transactions, as the plain language of the CSPA requires.

The definition of "supplier" in R.C. 1345.01(C) embraces only those entities "effecting" or soliciting consumer transactions. There has never been any contention by Anderson or her *amicus curiae* that mortgage servicers "solicit" consumer transactions. Mortgage servicers contract exclusively with the noteholders, and never with the individual borrowers, so it would make little sense as a practical matter for mortgage servicers to "solicit" business from individual homeowners.

As to whether mortgage servicers "effect" consumer transactions, the General Assembly's choice of the term "effecting" here (and not the broader term, affecting) is a meaningful one. To "effect" something means means "*to bring about; to make happen.*" Black's Law Dictionary at 592 (9th Ed. 2009); *see also* R.C. 1.42 ("Words *** shall be read in context and construed according to the rules of grammar and common usage.") One can imagine many ways that an entity might "affect" an individual's residential mortgage loan, even if that entity were not a party to the mortgage loan itself. Arguably, even mortgage servicers "affect" the parties' performance under a mortgage loan by facilitating that performance. But the statute says "effect" and that term has a specific – and very different – meaning than "affect". Notably, in its recently published Writing Manual and Guide to Citations, Style, and Judicial Opinion Writing, this very Court has noted the key distinction between the verbs "effect" and "affect," saying:

> *Affect* as a verb means *to influence* or *act on*. For example, "Her attempts to affect the legislative process were unsuccessful." "The wound affected his ability to walk." *** Used as a verb, *effect* means *to achieve or bring about*. For example, "The mediator sought to effect a settlement."

Supreme Court of Ohio Writing Manual at 111 (2011).

Mortgage servicers do not "bring about" or "make happen" the transactions between individual Ohio homeowners and their sellers or mortgage lenders. Mortgage servicers do not "effect" consumer transactions, whether those consumer transactions are the sale of real estate to an individual consumer *or* the extension of a mortgage loan to an individual consumer. As HomEq did in Anderson's case, mortgage servicers – pursuant to agreements with noteholders, not individual borrowers – receive scheduled periodic payments from borrowers and apply them toward principal, interest, and other obligations, and perform other payment-related processing services. Accordingly, mortgage servicers are not engaged in the business of "effecting" or soliciting any "consumer transaction" subject to the CSPA. For that additional reason, mortgage servicers are not "suppliers" subject to the Act, and the Court should answer the second certified question in the negative.

III. RESPONDENT ANDERSON BYPASSES THE THRESHOLD DEFINITIONS OF "CONSUMER TRANSACTION" AND "SUPPLIER" IN R.C. 1345.01(A).

Instead of carefully analyzing the threshold definitions of "consumer transaction" and "supplier," as HomEq has set forth above in response to the certified questions, Respondent Anderson has previously argued (in the certifying court, and also in the *GMAC* case as an *amicus curiae*) that mortgage servicing is not expressly included among the statutory *exemptions* to the CSPA. Thus, Anderson has argued, mortgage servicers – not being expressly listed among the named exemptions – must be covered

by the CSPA. Put another way, Anderson has contended that everyone and everything is subject to the Act unless expressly exempted. *See, e.g.*, Merit Brief of Amicus Curiae Sondra Anderson in *GMAC* at 10 ("an entity is included [in the CSPA's coverage] unless specifically excluded."); *see, also, id.* at 11 ("None of these exceptions applies to a stand alone mortgage servicer.")

As this Court has explained, however, that is simply not how the Court analyzes the scope and application of the CSPA. *See, e.g., Heritage Hills, Ltd. v. Deacon*, 49 Ohio St.3d 80, 82, 551 N.E.2d 125 (1990). There, this Court held that the CSPA does not apply to residential lease transactions despite "the Act [] not specifically exclud[ing] a lease of real property." *Id.*, 49 Ohio St.3d at 82; *see also In re Midwest Eye Center*, 104 Ohio App.3d 215, 217, 661 N.E.2d 774 (1995) (finding it unnecessary to consider exceptions to statute regarding reviewability determinations of Department of Health where "threshold criterion" in statute defining "reviewable activities" was not met.) The fact that remedial laws such as the CSPA are to be liberally construed pursuant to R.C. 1.11 does not mean that courts are to sweep aside the General Assembly's threshold definitional requirements and focus only on certain listed exceptions. Put another way, although mortgage servicers are not specifically identified in the statute as being exempt from the CSPA, mortgage servicing does not meet the threshold definitional requirements of the Act. There is no need for the General Assembly to expressly carve out specific businesses from the purview of the Act when those businesses do not qualify under those threshold definitional requirements.

IV. IF THE COURT FINDS R.C. 1345.01(A) OR (C) AMBIGUOUS, THEN THE RULES OF STATUTORY CONSTRUCTION CONFIRM THAT THE GENERAL ASSEMBLY NEVER INTENDED TO REGULATE MORTGAGE SERVICERS UNDER THE ACT.

If the Court finds that the CSPA is ambiguous as to whether mortgage servicing is a "consumer transaction," then the Court should "turn to other considerations to determine the intent of the General Assembly, as permitted by R.C. 1.49." *Griffith v. City of Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905, 941 N.E.2d 1157, at ¶ 14. R.C. 1.49 sets forth a non-exclusive list of factors for the Court to consider when interpreting an ambiguous statute. *See Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, at ¶ 37-43. Above all, however, "[t]here is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for." *In re Estate of Roberts*, 94 Ohio St.3d 311, 317, 2002-Ohio-791, 762 N.E.2d 1001 (citations and internal quotations omitted).

A. "Former Statutory Provisions" And "Laws Upon The Same Or Similar Subjects" Demonstrate That The General Assembly Did Not Intend For The CSPA To Apply To Mortgage Servicing.

From its inception through January 1, 2007, the CSPA did not cover <u>any</u> transactions in connection with residential mortgage loans. *See Torrance v. Cincinnati Mortgage Co. Inc.*, S.D.Ohio No. 1:08-CV-403, 2009 WL 961533, at *3-4 (Mar. 25, 2009), citing *Lewis v. ACB Business Services*, 135 F.3d 389, 412 (6th Cir. 1998). The CSPA specifically excluded from the term "consumer transaction" all transactions with financial institutions and "dealers in intangibles," *including mortgage lenders. See* R.C. 5725.01; *Torrance*, 2009 WL 961533, at *3-4 ("This exclusion applied universally to mortgage lenders[.]"), citing *Zanni v. Stelzer*, 174 Ohio App.3d 84, 2007-Ohio-6215,

880 N.E.2d 967, at ¶ 12 ("[U]nder the plain language of the CSPA, one who engages in the business of buying or selling mortgages qualifies as a 'dealer in intangibles' and is exempt from the Act.")

Effective January 1, 2007, the General Assembly expanded the scope of the CSPA to make subject to the CSPA three carefully delineated transactions and entities relating to residential mortgage loans: "transactions in connection with residential mortgages *between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers.*" (Emphasis added.) *See* Am.Sub.S.B. No. 185, Section 1345.01(A) (2006) (Appx. A-02); *see also* Am.Sub.S.B. No. 185, Final Analysis at 1 (2006) (Appx. A-06) (stating that Am.Sub.S.B. 185 "[e]xpand[ed] the application of the [CSPA] to include certain consumer transactions in connection with a residential mortgage."); *Torrance*, 2009 WL 961533, at *3–4. All other transactions in connection with residential mortgage loans – including mortgage servicing – remained outside the scope of the CSPA, as they had been for more than three decades. Indeed, "loan officers, mortgage brokers, or nonbank mortgage lenders" are all involved in the origination, purchase, and sale of mortgage loans and do not include individuals or entities like HomEq that merely service a loan on behalf of the true owner of the mortgage. *See* R.C. 1345.01(H), (J), and (K). None of these residential-mortgage-related amendments to Chapter 1345 apply to mortgage servicing and mortgage servicers. Had the General Assembly desired to add mortgage servicers to the list of "loan officers, mortgage brokers, or nonbank mortgage lenders," whose transactions would thereafter be subject to the CSPA, it could have easily done so.

Thus, the General Assembly originally excluded *all* transactions related to residential mortgages from the CSPA, then "[e]xpand[ed] the application" of the CSPA

to include only certain specific transactions related to residential mortgages: "transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers." *See* Am.Sub.S.B. No. 185, Final Analysis at 1, 5 (2006) (Appx. A-06, A-08.) This modest and carefully limited expansion of the CSPA simply did not capture mortgage servicers like HomEq.

Subsequent actions of the Ohio General Assembly likewise demonstrate its belief that the CSPA does not now apply to mortgage servicing and mortgage servicers. In May 2009, for example, the Ohio House of Representatives of the 128th General Assembly passed House Bill 3, which, among other things, *if enacted,* would have required mortgage servicers to register with the State and would have made the CSPA applicable to mortgage servicers. *See* Am.Sub.H.B. No. 3, Section 1323.361 (as passed by the House, May 20, 2009), lines 1855-1864, at 61 (Appx. A-12.) On January 12, 2010, in his testimony before the Senate Finance & Financial Institutions Committee, House Bill 3's sponsor, Representative Mike Foley, compared House Bill 3 to the January 1, 2007 amendments and enactments to the CSPA and explained that the CSPA would apply to mortgage servicers if the General Assembly enacted House Bill 3:

> House Bill 3 seeks to introduce best practices and necessary standards to servicers that are not already substantially regulated through their connection to a state or federally chartered lending institution. *By the authority of language similar to that which the legislature applied to mortgage brokers in Senate Bill 185 of the 126th General Assembly,* the Department of Commerce and Attorney General would ensure that *servicers* meet professional standards of operation and engage in appropriately robust efforts to modify mortgages and maintain homeownership when it is reasonably possible and equitable. *Moreover, licensed servicers would be subject to Ohio's Consumer Sales Protection* [sic] *Act.*

(Emphasis added.) Am. Sub. H.B. No. 3, Sponsor Testimony, State Representative Mike Foley (Jan. 12, 2010) (Appx. A-14.)

Sponsor Foley's testimony is significant in at least two ways. First, it analogizes House Bill 3 to Senate Bill 185 of the 126th General Assembly, also known as the Ohio Homebuyers' Protection Act. As discussed above, Senate Bill 185 "[e]xpand[ed] the application of the [CSPA] to include certain consumer transactions in connection with a residential mortgage" by revising the definition of "consumer transaction" to "expressly include[] transactions in connection with residential mortgages between loan officers, mortgage brokers, and nonbank mortgage lenders and their customers[.]" In other words, House Bill 3 – *if enacted* – would have expanded the application of the CSPA to include mortgage servicing within the definition of "consumer transaction," just as Senate Bill 185 had previously expanded the scope of the CSPA to include transactions in connection with residential mortgages between loan officers, mortgage brokers, and nonbank mortgage lenders and their customers. Second, Sponsor Foley's testimony states that under House Bill 3, mortgage servicers "*would be* subject to Ohio's Consumer Sales Protection [sic] Act" (emphasis added), implying that mortgage servicers are not presently subject to the CSPA. House Bill 3, however, was never passed by the General Assembly and thus never became law.

Two other bills intended to regulate mortgage servicing were introduced in the 129th General Assembly in early 2011 but have also not been enacted into law. *See* S.B. No. 14, Section 1323.19 (as introduced in February 2011 by Senator Skindell to establish the Residential Mortgage Servicers Registration Act, to be administered by the Superintendent of Financial Institutions of the Department of Commerce), lines 1552-1561, at 51 (Appx. A-59); H.B. No. 187, Section 1323.19 (as introduced in April 2011 by Representatives Driehaus and Foley to establish the Residential Mortgage Servicers

Registration Act, to be administered by the Superintendent of Financial Institutions of the Department of Commerce), lines 1555-1564, at 51 (Appx. A-61.)

The Court considers pending and failed legislation in determining legislative intent. *See, e.g., Heritage Hills, supra,* 49 Ohio St.3d at 82-83. In *Heritage Hills*, on its way to holding that the CSPA does not apply to residential lease transactions, the Court relied on the General Assembly's rejection of a bill that would have specifically included the lease of real property within the definition of "consumer transaction" as evidence that residential lease transactions are not "consumer transactions" under the CSPA. *See* 49 Ohio St.3d at 82-83. In the same way that the Court in *Heritage Hills* considered failed legislation in its analysis, the Court in this case should consider the rejected House Bill 3 as evidence that the General Assembly does not intend for the CSPA to apply to mortgage servicers. *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137-138, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (although "chary" of ascribing significance to Congress's failure to act, the U.S. Supreme Court unanimously assigns significance to Congressional rejection of a proposed House bill that would have narrowed the definition of "waters" subject to jurisdiction of the Army Corps of Engineers under the Clean Water Act.).

In the time since the CSPA's passage in 1972, the General Assembly has amended the CSPA eight times, including one amendment during the pendency of this proceeding, and yet has never altered the CSPA's scope to encompass mortgage servicers. House Bill 3 was a proposed alteration of the scope of the CSPA, as Sponsor Foley testified that mortgage servicers "would be" subject to the CSPA, and the General Assembly *declined* to pass that bill. This Court should decline any invitation from

Anderson or her *amici* to make the CSPA say something that the General Assembly purposefully decided that it should not say.

B. "The Consequences Of A Particular Construction" Demonstrate That The General Assembly Did Not Intend For The CSPA To Apply To Mortgage Servicing.

Anderson and her *amici* are asking the Court to construe the CSPA in a way that would render superfluous the definitions of "consumer transaction" and "supplier." Of course, the General Assembly intended for the definitions of "consumer transaction" and "supplier" to have meaning. If the Court construed the CSPA to cover mortgage servicers, then anyone or anything that has any contact with a potential consumer would be subject to the CSPA, unless one of the exceptions applied. This was not the intent of the General Assembly when it enacted the CSPA. *See* R.C. 1.47(B); *see also D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶ 26 (answering question certified from the N.D. Ohio regarding whether statute vested local boards of health with plenary authority to adopt any regulations deemed necessary for the public health, and noting that "words in statutes should not be construed to be redundant, nor should any words be ignored. *** No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." (citations and internal quotations omitted)). If the Court construed the CSPA to cover mortgage servicers, effectively rendering anyone or anything that has any contact with a homebuyer subject to the CSPA, then consider the effect of such a decision on the "collateral services" principle discussed above. Instead of being outside the purview of the CSPA as providing merely "collateral services" to pure real estate transactions, as several Ohio state and federal courts have agreed they should be, all of these collateral

service providers would find themselves in jeopardy of CSPA suits from aggrieved homebuyers. If such a sea-change in the CSPA is warranted, then it should be accomplished by the legislature in the form of new legislation.

V. MORTGAGE SERVICERS ARE REGULATED UNDER FEDERAL LAW, MAKING IT ALL THE MORE UNNECESSARY FOR THIS COURT TO JUDICIALLY REWRITE THE CSPA.

Those who advocate in favor of bringing mortgage servicing under the purview of the CSPA sometimes suggest that the industry operates in a regulatory vacuum, where Ohio consumers such as Respondent are the victims of an unsupervised industry where "anything goes." But this is simply not true. In fact, the website of the federal Consumer Financial Protection Bureau ("CFPB") (established under the Dodd-Frank Act), which operates under the leadership of former Ohio Attorney General Richard Cordray, provides a helpful summary of the many federal laws that already regulate the mortgage servicing industry. *See* CFPB Mortgage Servicing-Examination Procedures (Appx. A-43.)[2] As CFPB's website explains, a constellation of federal laws that are already in place impose a myriad of requirements upon the mortgage servicing industry:

- The Real Estate Settlement Procedures Act (RESPA) and its implementing regulation, Regulation X, impose requirements for servicing transfers, written consumer inquiries, and escrow account maintenance.
- The Truth in Lending Act (TILA) and its implementing regulation, Regulation Z, generally impose requirements on owners for home mortgage ownership transfers. It also imposes requirements on servicers regarding crediting of payments, imposition of late fee and delinquency charges, and provision of payoff statements with respect to closed-end consumer credit transactions secured by a principal dwelling. For open-end mortgages, Regulation Z

[2] *Available at*: http://www.consumerfinance.gov/guidance/supervision/manual/mortgage-servicing-examination-procedures/.

provisions related to payment crediting and error resolution apply to the extent that the servicer is a creditor.

- The Electronic Funds Transfer Act (EFTA) and its implementing regulation, Regulation E, impose requirements if servicers within the scope of coverage obtain electronic payments from borrowers.

- The Fair Debt Collection Practices Act (FDCPA) governs collection activities conducted by third-party collection agencies, as well as servicer collection activities if the servicer acquired the loan when it was already in default.

- The Homeowners Protection Act (HPA) limits private mortgage insurance that can be assessed on customer accounts.

- The Fair Credit Reporting Act (FCRA) requires servicers that furnish information to consumer reporting agencies to ensure the accuracy of data placed in the consumer reporting system. The FCRA also limits certain information sharing between company affiliates.

- The Gramm-Leach-Bliley Act (GLBA) requires servicers within the scope of coverage to provide privacy notices and limit information sharing in particular ways.

- The Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B, apply to those servicers that are creditors, such as those who participate in a credit decision about whether to approve a mortgage loan modification. The statute makes it unlawful to discriminate against any borrower with respect to any aspect of a credit transaction [on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance, or the borrower's exercise of rights under the Consumer Credit Protection Act.]

(*Id.*, Appx. A-44-45.)

These federal laws are not the end of the story. As CFPB's website goes on to explain, only days ago on August 10, 2012, the Bureau proposed brand new mortgage servicing rules to protect consumers.[3] These proposed rules, which fill hundreds of

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[3] David Silberman, CFPB Blog Post, *Putting the "service" back in "mortgage servicing"* (Aug. 10, 2012), *available at*: http://www.consumerfinance.gov/blog/putting-the-serviceback-in-mortgage-servicing/. (Appx. A-47.)

pages, would implement the Dodd-Frank Wall Street Reform and Consumer Protection Act provisions regarding mortgage loan servicing.[4] Thus, there can be no debate that mortgage servicers are currently regulated under federal law (and soon will be even more comprehensively regulated, upon adoption of the new proposed rules), making it all the more unnecessary and inappropriate for this Court to judicially rewrite an existing state consumer protection statute that the General Assembly never intended to apply to mortgage servicers.

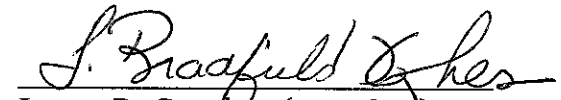
CONCLUSION

For the foregoing reasons, and for the reasons previously briefed and argued to the Court in the *GMAC* certified-question case, this Court should answer both of the questions certified by the Northern District of Ohio in the negative. By its plain language, the CSPA does not apply to mortgage servicers. HomEq is not engaged in a "consumer transaction" when, pursuant to its Pooling and Servicing Agreements *with noteholders – not consumers*, it services residential mortgage loans *for the benefit of those noteholders*. Nor is HomEq a "supplier[]*** engaged in the business of effecting or soliciting consumer transactions." HomEq does not solicit mortgage loans, nor does it effect ("bring about") them. These conclusions are compelled by the plain language of R.C. 1345.01(A) & (C), as well as the canons of statutory construction set forth in R.C. 1.49. These conclusions are also confirmed by the 128th General Assembly's rejection of legislation that, *if enacted, would have* brought mortgage servicers within the purview

[4] As of the date of this filing, the new proposed rules had not yet been published by the Federal Register. Links to the proposed rules are available on the CFPB's website, *at:* http://files.consumerfinance.gov/f/201208_cfpb_tila_proposed_rules.pdf (TILA proposal, 12 C.F.R. Part 1026); *and* http://files.consumerfinance.gov/f/201208_cfpb_respa_proposed_rules.pdf (RESPA proposal, 12 C.F.R. Part 1024).

of the Act. HomEq thus respectfully requests that the Court answer both certified questions in the negative and, pursuant to S.Ct. Prac. R. 18.8, deliver its opinion to the certifying court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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APPENDIX

(126th General Assembly)
(Amended Substitute Senate Bill Number 185)

AN ACT

To amend sections 109.572, 1321.57, 1322.02, 1322.03, 1322.031, 1322.04, 1322.041, 1322.051, 1322.06, 1322.061, 1322.062, 1322.07, 1322.10, 1322.11, 1322.99, 1343.011, 1345.01, 1345.02, 1345.03, 1345.05, 1345.07, 1345.09, 1349.25, 1349.27, 1349.31, 3953.23, 4735.05, 4763.03, 4763.05, 4763.06, 4763.12, 4763.13, and 4763.99 and to enact sections 1321.541, 1322.063, 1322.064, 1322.074, 1322.075, 1322.081, 1345.031, 1345.091, 1349.271, 1349.41, 1349.43, 1349.44, 1349.71, 1349.72, 3953.30, 3953.32, 3953.33, 3953.35, and 4763.19 of the Revised Code to modify the application of the Consumer Sales Practices Act and the Consumer Credit Mortgage Loan Law; to generally prohibit the appraisal of real estate for a mortgage loan without state certification or licensure; to require that a national criminal background check be conducted on all applicants for a mortgage broker certificate of registration, loan officer license, or real estate appraiser certificate or license; to modify the Mortgage Broker/Loan Officer Law with respect to disclosure of information, duties and standards of care, prohibited acts, record keeping, educational requirements, and pre-licensure examination; to modify the Title Insurance Agent Law; to establish the Consumer Education Finance Board; and to make other changes relative to mortgage lending.

Be it enacted by the General Assembly of the State of Ohio:

receive either directly or indirectly from a seller or buyer of real estate any discount points in excess of two per cent of the original principal amount of the residential mortgage. This division is not a limitation on discount points or other charges for purposes of section 501(b)(4) of the "Depository Institutions Deregulation and Monetary Control Act of 1980," 94 Stat. 161, 12 U.S.C.A. 1735f-7a.

(C) ~~Residential~~ (1) Except as provided in division (C)(2) of this section, residential mortgage obligations ~~contracted for on or after November 4, 1975,~~ may be prepaid or refinanced without penalty at any time after five years from the execution date of the mortgage. Prior to such time a prepayment or refinancing penalty may be provided not in excess of one per cent of the original principal amount of the residential mortgage.

(2)(a) No penalty may be charged for the prepayment or refinancing of a residential mortgage obligation of less than seventy-five thousand dollars that is made or arranged by a mortgage broker, loan officer, or nonbank mortgage lender, as those terms are defined in section 1345.01 of the Revised Code, and that is secured by a mortgage on a borrower's real estate that is a first lien on the real estate.

(b) The amount specified in division (C)(2)(a) of this section shall be adjusted annually on the first day of January by the annual percentage change in the consumer price index for all urban consumers, midwest region, all items, as determined by the bureau of labor statistics of the United States department of labor or, if that index is no longer published, a generally available comparable index, as reported on the first day of June of the year preceding the adjustment. The department of commerce shall publish the adjusted amounts on its official web site.

Sec. 1345.01. As used in sections 1345.01 to 1345.13 of the Revised Code:

(A) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, except for transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.

(B) "Person" includes an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or other legal entity.

(C) "Supplier" means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. If the consumer transaction is in connection with a residential mortgage, "supplier" does not include an assignee or purchaser of the loan for value, except as otherwise provided in section 1345.091 of the Revised Code. For purposes of this division, in a consumer transaction in connection with a residential mortgage, "seller" means a loan officer, mortgage broker, or nonbank mortgage lender.

(D) "Consumer" means a person who engages in a consumer transaction with a supplier.

(E) "Knowledge" means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness.

(F) "Natural gas service" means the sale of natural gas, exclusive of any distribution or ancillary service.

(G) "Public telecommunications service" means the transmission by electromagnetic or other means, other than by a telephone company as defined in section 4927.01 of the Revised Code, of signs, signals, writings, images, sounds, messages, or data originating in this state regardless of actual call routing. "Public telecommunications service" excludes a system, including its construction, maintenance, or operation, for the provision of telecommunications service, or any portion of such service, by any entity for the sole and exclusive use of that entity, its parent, a subsidiary, or an affiliated entity, and not for resale, directly or indirectly; the provision of terminal equipment used to originate telecommunications service; broadcast transmission by radio, television, or satellite broadcast stations regulated by the federal government; or cable television service.

(H) "Loan officer" has the same meaning as in section 1322.01 of the Revised Code, except that it does not include an employee of a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; an employee of a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an employee of an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect

to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

(I) "Residential mortgage" or "mortgage" means an obligation to pay a sum of money evidenced by a note and secured by a lien upon real property located within this state containing two or fewer residential units or on which two or fewer residential units are to be constructed and includes such an obligation on a residential condominium or cooperative unit.

(J) "Mortgage broker" has the same meaning as in section 1322.01 of the Revised Code, except that it does not include a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration; or an employee of any such entity.

(K) "Nonbank mortgage lender" means any person that engages in a consumer transaction in connection with a residential mortgage, except for a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

(L) For purposes of divisions (H), (J), and (K) of this section:

(1) "Control" of another entity means ownership, control, or power to vote twenty-five per cent or more of the outstanding shares of any class of voting securities of the other entity, directly or indirectly or acting through one or more other persons.

(2) "Credit union service organization" means a CUSO as defined in 12 C.F.R. 702.2.

Sec. 1345.02. (A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:

(1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;

(2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

(3) That the subject of a consumer transaction is new, or unused, if it is not;

(4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;

(6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(7) That replacement or repair is needed, if it is not;

(8) That a specific price advantage exists, if it does not;

(9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;

(10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

(C) In construing division (A) of this section, the court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45 (a)(1) of the "Federal Trade Commission Act," 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended.

(D) No supplier shall offer to a consumer or represent that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit is contingent upon an

Jennifer A. Parker
Daniel M. DeSantis
Amber Hardesty

Legislative Service Commission

Am. Sub. S.B. 185

126th General Assembly
(As Passed by the General Assembly)

Sens. **Padgett, Schuring, Roberts, Carey, Amstutz, Armbruster, Brady, Dann, Fedor, Fingerhut, Grendell, Hagan, Harris, Jacobson, Miller, Prentiss, Spada, Zurz, Mumper, Clancy, Cates, Wilson, Kearney, Miller, D.**

Reps. **Coley, Smith, G., Wagoner, Hagan, Schneider, Evans, C., Patton, T., White, Smith, S., Stewart, J., Stewart, D., Allen, Healy, Koziura, Boccieri, Widener, Aslanides, Barrett, Beatty, Blessing, Book, Chandler, Collier, DeBose, DeGeeter, Distel, Dolan, Domenick, Driehaus, Evans, D., Fende, Fessler, Flowers, Garrison, Gilb, Hartnett, Harwood, Hughes, Key, Kilbane, Martin, Mason, McGregor, J., McGregor, R., Mitchell, Oelslager, Otterman, Patton, S., Perry, Peterson, Redfern, Reidelbach, Sayre, Schaffer, Schlichter, Skindell, Strahorn, Sykes, Ujvagi, Widowfield, Williams, Woodard, Yates, Yuko**

Effective date: September 21, 2006; Sections 1 and 2 effective January 1, 2007

ACT SUMMARY

- Expands the application of the Consumer Sales Practices Act to include certain consumer transactions in connection with a residential mortgage.
- Generally prohibits the appraisal of real estate for a mortgage loan without state certification or licensure.
- Prohibits any person from corrupting or improperly influencing the independent judgment of a real estate appraiser with respect to the value of the dwelling offered as security for a mortgage loan.
- Requires that a national criminal background check be conducted on all applicants for a real estate appraiser certificate or license, a mortgage broker certificate of registration, or a loan officer license.
- Modifies the Mortgage Brokers/Loan Officers Law, including with respect to pre-licensure education and examination, disclosure of

CONTENT AND OPERATION

Consumer Sales Practices Act

Background

(R.C. Chapter 1345.)

The Consumer Sales Practices Act (CSPA) prohibits "unfair or deceptive acts or practices" by suppliers in connection with consumer transactions, such as falsely representing the characteristics of a product, falsely indicating that a specific price advantage exists, misrepresenting a warranty, or falsely indicating the need for a repair.[1] The CSPA also prohibits "unconscionable acts or practices" in consumer transactions, such as taking advantage of a person's inability to understand the transaction's terms, making misleading statements on which a consumer is likely to rely, selling goods when the supplier knows the consumer cannot pay in full, or selling services to a consumer who is unable to receive a substantial benefit from the purchase.[2]

The CSPA authorizes the Attorney General to investigate alleged violations and to seek civil penalties and reinedies.[3] It also provides consumers with a private right of action.[4] In an individual action, a consumer generally may rescind the transaction or recover the individual's damages. In certain circumstances, the consumer may recover three times the amount of actual damages or $200, whichever is greater, or may recover damages or other appropriate relief in a class action. The CSPA also permits consumers to seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that constitutes a violation. The court may award to the prevailing party a reasonable attorney's fee if the consumer brought an action that is groundless and filed the action in bad faith *or* the violation was knowingly committed.

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[1] *R.C. 1345.02.*

[2] *R.C. 1345.03.*

[3] *R.C. 1345.07.*

[4] *R.C. 1345.09.*

Scope of "consumer transaction" and "supplier"

(R.C. 1345.01)

For purposes of the CSPA, "**consumer transaction**" is defined as a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. Transactions *excluded* from the definition of "consumer transaction" include transactions between public utilities and their customers; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between financial institutions, dealers in intangibles, or insurance companies and their customers.[5]

Under the act, "**consumer transaction**" expressly *includes* transactions in connection with residential mortgages between loan officers, mortgage brokers, and nonbank mortgage lenders and their customers, despite the exemptions described above. For these purposes:

--"**Residential mortgage**" or "**mortgage**" is defined as an obligation to pay a sum of money evidenced by a note and secured by a lien upon real property located within Ohio containing two or fewer residential units or on which two or fewer residential units are to be constructed, and includes such an obligation on a residential condominium or cooperative unit.

--"**Loan officer**" has the same meaning as in the Mortgage Brokers/Loan Officers Law (R.C. 1322.01(E)), *except* that it does not include an employee of (1) a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under Ohio law or the laws of another state or the United States, (2) a subsidiary of such a bank, savings bank, savings and loan association, or credit union, or (3) an affiliate that (a) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (b) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Office of Thrift

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[5] *A "**dealer in intangibles**" is a person with an office in Ohio who engages in a business that consists primarily of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness, or of buying or selling bonds, stocks, or other investment securities. Financial institutions, insurance companies, and institutions used exclusively for charitable purposes are not considered dealers in intangibles. (R.C. 5725.01(B).) "**Financial institution**" is defined in R.C. 5725.01(A).*

Supervision, the Federal Deposit Insurance Corporation, or the National Credit Union Administration.

--"**Mortgage broker**" has the same meaning as in the Mortgage Brokers/Loan Officers Law (R.C. 1322.01(G)), *except* that it does not include (1) a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under Ohio law or the laws of another state or the United States, (2) a subsidiary of such a bank, savings bank, savings and loan association, or credit union, (3) an affiliate that (a) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (b) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, or the National Credit Union Administration, or (4) an employee of any such entity.

--"**Nonbank mortgage lender**" means any person that engages in a consumer transaction in connection with a residential mortgage, *except* for (1) a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under Ohio law or the laws of another state or the United States, (2) a subsidiary of such a bank, savings bank, savings and loan association, or credit union, or (3) an affiliate that (a) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (b) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, or the National Credit Union Administration.

--"**Control**" of another entity means ownership, control, or power to vote 25% or more of the outstanding shares of any class of voting securities of the other entity, directly or indirectly or acting through one or more other persons.

--"**Credit union services organization**" has the same meaning as "CUSO" in the Code of Federal Regulations, 12 C.F.R. 702.2.

Under ongoing law, "**supplier**" is defined as a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. The act adds that, if the consumer transaction is in connection with a residential mortgage, "**supplier**" excludes an assignee or purchaser of the loan for value,

except as otherwise permitted (see "***Assignee liability***," below) and "**seller**" means a loan officer, mortgage broker, or nonbank mortgage lender.

Unfair or deceptive acts or practices

(R.C. 1345.02)

As mentioned above under "***Background***," the CSPA prohibits suppliers from committing unfair or deceptive acts or practices and lists several deceptive acts or practices of general application. For example, continuing law states that it is deceptive for a supplier to represent that a specific price advantage exists, if it does not. The act specifies two additional deceptive acts for consumer transactions in connection with a residential mortgage. These are knowingly failing to provide disclosures required under Ohio and federal law and knowingly providing a disclosure that includes a material misrepresentation.

Unconscionable acts or practices

(R.C. 1345.03 and 1345.031; Section 3(B))

Continuing law generally sets forth prohibited acts or practices that are considered unconscionable under the CSPA. The act specifies that these provisions do not apply to consumer transactions in connection with a residential mortgage. Instead, the act indicates a separate list of unconscionable acts or practices for consumer transactions in connection with a residential mortgage. The following acts or practices of a supplier in connection with such a transaction are unconscionable, whether they occur before, during, or after the transaction:

--Arranging for or making a mortgage loan that provides for a higher interest rate after default than before default. This excludes higher interest rates allowed for judgments applicable to the mortgage loan and also excludes interest rate changes in a variable rate loan transaction otherwise consistent with the provisions of the loan documents.

--Engaging in a pattern or practice of providing consumer transactions to consumers based predominantly on the supplier's realization of the foreclosure or liquidation value of the consumer's collateral without regard to the consumer's ability to repay the loan in accordance with its terms, provided that the supplier may use any reasonable method to determine a borrower's ability to repay.

--Making a consumer transaction that permits the creditor to demand repayment of the outstanding balance of a mortgage loan, in advance of the original maturity date, unless the creditor does so in good faith due to the consumer's failure to abide by the material terms of the loan.

As Passed by the House

128th General Assembly
Regular Session
2009-2010

Am. Sub. H. B. No. 3

Representatives Foley, Driehaus

Cosponsors: Representatives Heard, Skindell, Stewart, Yuko, Hagan, Harris, Williams, B., Williams, S., Yates, Luckie, Patten, Slesnick, Ujvagi, Letson, Harwood, Boyd, Weddington, Winburn, Pryor, Murray, Mallory, Domenick, DeBose, Brown, Chandler, DeGeeter, Dyer, Gerberry, Koziura, Lundy, Pillich

A BILL

To amend sections 109.572, 1181.05, 1181.21, 1321.52, 1322.05, and 5713.03 and to enact sections 1323.01, 1323.02, 1323.04 to 1323.11, 1323.20 to 1323.36, 1323.361, 1323.37, 1323.99, 2303.33, 2308.01, 2308.02, 2308.021, and 2308.03 of the Revised Code to declare a six-month moratorium on mortgage foreclosures, to require registration of residential mortgage servicers, to regulate residential mortgage servicers, to establish a database to track foreclosures, to adopt procedures and requirements related to residential foreclosure actions, to adopt civil and criminal penalties for violations of the bill's provisions, and to terminate the moratorium provisions of this act six months after its effective date by repealing section 2308.03 of the Revised Code on that date.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

(7) Causing a telephone to ring or engaging any person in a telephone conversation repeatedly or continuously, or at unusual times or times known to be inconvenient, with the intent to annoy, abuse, oppress, or threaten any person at the called number.

(B) The requirements set forth in this section are in addition to any other requirement set forth in federal or state law regulating the conduct of collection activities, including the Federal Fair Debt Collection Practices Act, 91 Stat. 874 (1977), 15 U.S.C. 1692 et seq.

Sec. 1323.361. (A) No mortgage servicer, in conducting a mortgage servicer business, shall engage in any unfair, deceptive or unconscionable act in violation of Chapter 1345. of the Revised Code. Any violation of the sections set forth in division (H) of section 1323.33 or section 1323.34, 1323.35, or 1323.36 of the Revised Code is an unfair and deceptive act or practice in violation of section 1345.02 of the Revised Code. The attorney general may take enforcement action and a borrower may seek recovery under Chapter 1345. of the Revised Code for the violations set forth in this division.

(B) A borrower injured by a violation of division (A) of this section may not recover damages, attorney's fees, and costs under Chapter 1345. of the Revised Code if the borrower has recovered damages in a cause of action initiated under section 1323.37 of the Revised Code and the damages sought under Chapter 1345. of the Revised Code are based on the same acts or circumstances as the damages awarded under section 1323.37 of the Revised Code.

Sec. 1323.37. (A) A borrower injured by a violation of sections 1323.20 to 1323.37 of the Revised Code may recover damages in an amount not less than all improper charges or fees

HB 3 Sponsor Testimony
State Representative Mike Foley
January 12, 2010

This comprehensive piece of legislation is aimed at providing much needed assistance to homeowners attempting to save their homes during this economic crisis; to help preserve wealth and property values for neighboring homeowners and communities and to also to correct some of the institutional flaws of our foreclosure process in Ohio. In drafting this legislation we worked closely with many interested parties. We also heard public testimony from 30 witnesses across 4 months of weekly committee hearings. In doing so we have taken aspects of some of the best foreclosure legislation throughout the country and placed them together in what we feel is the most aggressive piece of state legislation in the U.S. to address the foreclosure crisis. While a six-month moratorium may grab headlines, there are many more provisions in this legislation that we think are necessary changes to our foreclosure process.

This bill has four primary components:

- A conditional, six-month moratorium on certain foreclosure judgments;
- A licensing and regulation package for mortgage servicers;
- An information package, which includes a mortgage servicing database, foreclosure notification requirements, and transparency requirements during foreclosure proceedings;
- A foreclosure filing fee that would provide funding for database administration, community redevelopment, financial education, and credit and foreclosure counseling.

Limited Moratorium

House Bill 3's six-month moratorium would allow all foreclosures cases to be filed, but would prohibit final judgments in cases where the homeowner has requested to participate in the moratorium and continues to pay at least half of their monthly mortgage in addition to their tax and insurance escrow. Vacant homes, non-residential properties, and residential properties intended for three or more families are not eligible. The moratorium is tailored for households that have some source of income, and are perceived as having a good chance at finding a successful mortgage modification or payment plan or may be eligible for the Federal Home Affordable Modification Program (HAMP) plan.

A primary concern among opponents of HB3 is that the moratorium would draw out foreclosure proceedings, or force lenders to hold-on to investments that are not performing. However, because it only applies to occupied, engaged and responsive households who are able to pay at least half of their monthly mortgage for the six-month period, proponents feel that the moratorium would have a minimal impact on caseloads or portfolio performance. A majority of residential foreclosures will still come to bear swiftly through default judgments, in which homeowners are not present, or not

responsive, and many others will move forward because of the total loss of household income.

Additionally, mortgages held by Credit Unions and those depositories and community banks that are headquartered in Ohio, have total assets less than or equal to $2.5 billion, and originate and service their loans are exempt from this moratorium. HB3 recognizes that these entities regularly engage in successful voluntary mortgage modifications, due to their unique connection to their borrowers and communities.

Servicer Licensing and Regulation

Mortgage servicers take many shapes. Some are actually divisions of a bank or lending institution, or act as subsidiaries or affiliates to lenders, while still more are completely independent businesses. Despite these differences, all mortgage servicers play a similar role in the mortgage industry: they collect, process, and relay mortgage payments from borrowers (homeowners) to lenders, investors, local governments, and insurance companies, who have an interest in the real estate value, principle, or interest represented by a mortgaged property.

Structurally, servicers are at the crux of the mortgage industry, being the only channel of communication between lenders and homeowners. Irregularities, deficiencies and a lack of oversight compound the difficulty that many servicers have in fulfilling their obligations in a state that processed over 85,000 foreclosures last year. Because of the critical role that servicers play, we ensure certain standards of conduct through licensing servicers at the state level.

House Bill 3 seeks to introduce best practices and necessary standards to servicers that are not already substantially regulated through their connection to a state or federally chartered lending institution. By the authority of language similar to that which the legislature applied to mortgage brokers in Senate Bill 185 of the 126th General Assembly, the Department of Commerce and Attorney General would ensure that servicers meet professional standards of operation and engage in appropriately robust efforts to modify mortgages and maintain homeownership when it is reasonably possible and equitable. Moreover, licensed servicers would be subject to Ohio's Consumer Sales Protection Act.

Information and Transparency

House Bill 3 seeks to give homeowners earlier notice of impending foreclosures, allowing for more time to craft payment workouts or mortgage modifications. Specifically, all lenders would be required to give notice with specified information to a homeowner 60 days prior to an initial foreclosure filing on any residential foreclosure.

In order to ensure accurate enforcement of servicers, to collect valuable information about foreclosures in Ohio, and to offer greater transparency during foreclosure proceedings, HB 3 creates a statewide foreclosure database and would require *all* lenders and servicers to enter information on each mortgage into the database prior to

filing any residential foreclosure. Foreclosing lenders and servicers would be required to report details such as loss mitigation efforts and must provide proof that this information has been entered at the time of filing.

Providing more information to our courts is not enough, however. Each party must be fully able to pursue all possible alternatives to foreclosure. Presently, it is rare for attorneys representing servicers or lenders in foreclosure proceedings to have the authority to compromise with homeowners. In fact, it is often difficult to identify exactly who owns a mortgage in order to open such a discussion. House Bill 3 requires that ownership of the note and mortgage are clear and unambiguous before action is filed. HB 3 then requires an affidavit of plaintiff's counsel that they directly represent and are authorized to negotiate on behalf of the responsible investor representative. No intermediary representation would be permitted.

Foreclosure filing fee

House Bill 3 would charge a $750 foreclosure filing fee to lenders or servicers at the time of foreclosure filing. This fee could not be passed on to the homeowner. It would be collected and placed in the newly created Foreclosure Prevention Revolving Trust Fund and would be further allocated as follows:

- 37.5% to local government to be used toward community redevelopment, financial education and credit and foreclosure counseling.
- 37.5% to the Ohio Housing Trust Fund to fund statewide foreclosure programs, rescue grants and loans, and homeowner transition money.
- 10% to Division of Financial Institutions-Consumer Finance (DFI-CF) for education, enforcement and outreach in dealings with foreclosure, mortgage fraud, and foreclosure prevention fraud.
- 5% for the Attorney General's office to investigate illegal activities associated with mortgage fraud and foreclosure prevention fraud.
- 10% to the Ohio Supreme Court for database administration and mediation services.

The Foreclosure Prevention Revolving Trust Fund would be a new fund for the purpose of providing grants to foreclosure prevention counseling entities, individuals or counseling entities for providing emergency foreclosure prevention assistance, as well as similar state and local foreclosure prevention entities.

Similar to House Bill 3's moratorium provisions, those Credit Unions and community banks that were exempt would not be required to pay this fee, nor would it be applied to vacant properties.

In the end, this effort is about preserving housing values and trying to provide some stability to the housing market. There is no doubt that borrowers, lenders, investors, regulators and bond rating agencies made a lot of dumb decisions over the past several years. At a minimum, a lot of wishful thinking at a lot of different levels occurred.

We believe it's time we stop debating the cause of the foreclosure crisis and act quickly to diminish the further deterioration of our communities. This bill is a positive step

forward and will ensure that every effort is made to ensure borrowers and lenders alike make the best effort to prevent a worsening of this crisis.

Thank you for listening to our testimony, we would be happy to take any questions at this time.

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EXHIBIT 4

MORGAN STANLEY ABS CAPITAL I INC.,
Depositor,

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,
Servicer,

COUNTRYWIDE HOME LOANS SERVICING LP,
Servicer,

HOMEQ SERVICING CORPORATION,
Servicer,

ACCREDITED HOME LENDERS, INC.,
Responsible Party,

FIRST NLC FINANCIAL SERVICES, LLC,
Responsible Party,

MILA, INC.,
Responsible Party,

and

DEUTSCHE BANK NATIONAL TRUST COMPANY,
Trustee

POOLING AND SERVICING AGREEMENT
Dated as of May 1, 2005

MORGAN STANLEY HOME EQUITY LOAN TRUST 2005-2

MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2005-2

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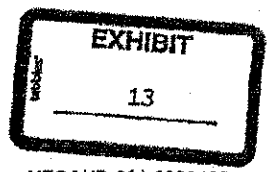

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ADVANCES BY THE SERVICERS

ARTICLE V

THE CERTIFICATES

ARTICLE VI

THE DEPOSITOR AND THE SERVICERS

ARTICLE VII

DEFAULT

ARTICLE VIII

CONCERNING THE TRUSTEE

ARTICLE IX

TERMINATION

Exhibit L Form of Certification to be provided with Form 10-K

Exhibit M Form of Certification to be provided by the Trustee to Depositor

Exhibit N Form of Certification to be provided by the applicable Servicer to Depositor

Exhibit O Form of Servicer Power of Attorney

Exhibit P Accredited Purchase Agreement

Exhibit Q First NLC Purchase Agreement

Exhibit R Meritage Agreements

Exhibit S MILA Purchase Agreement

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THIS POOLING AND SERVICING AGREEMENT, dated as of May 1, 2005, among MORGAN STANLEY ABS CAPITAL I INC., a Delaware corporation (the "Depositor"), JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national banking association ("JPMorgan"), COUNTRYWIDE HOME LOANS SERVICING LP, a Texas limited partnership ("Countrywide"), HOMEQ SERVICING CORPORATION, a New Jersey corporation ("HomEq" and, together with JPMorgan and Countrywide, the "Servicers"), ACCREDITED HOME LENDERS, INC., a California corporation ("Accredited"), FIRST NLC FINANCIAL SERVICES, LLC, a Florida limited liability company ("First NLC"), MILA, INC., a Washington corporation ("MILA" and, together with Accredited and First NLC, the "Responsible Parties"), and DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee (the "Trustee").

W I T N E S S E T H:

In consideration of the mutual agreements herein contained, the parties hereto agree as follows:

PRELIMINARY STATEMENT

The Trustee shall elect that two segregated asset pools within the Trust Fund be treated for federal income tax purposes as comprising two REMICs (each, a "REMIC" or, in the alternative, the Lower Tier REMIC and the Upper Tier REMIC, respectively). Each Class of Certificates (other than the Class P and Class R Certificates), other than the right of each Class of LIBOR Certificates to receive Basis Risk CarryForward Amounts and the right of the Class X Certificates to receive payments from the Interest Rate Cap Agreements, represents ownership of a regular interest in the Upper Tier REMIC for purposes of the REMIC Provisions. The Class R Certificate represents ownership of the sole class of residual interest in each of the Lower Tier REMIC and the Upper Tier REMIC for purposes of the REMIC Provisions. The Startup Day for each REMIC described herein is the Closing Date. The latest possible maturity date for each Certificate is the latest date referenced in Section 2.05. The Upper Tier REMIC shall hold as assets the several classes of uncertificated Lower Tier Regular Interests, set out below. Each such Lower Tier Regular Interest is hereby designated as a regular interest in the Lower Tier REMIC. The Class LT-A-1ss, Class LT-A-1mz, Class LT-A-2a, Class LT-A-2b, Class LT-A-2c, Class LT-M-1, Class LT-M-2, Class LT-M-3, Class LT-M-4, Class LT-M-5, Class LT-M-6, Class LT-B-1, Class LT-B-2 and Class LT-B-3 Interests are hereby designated the LT-Accretion Directed Classes (the "LT-Accretion Directed Classes"). The Class P Certificates represent beneficial ownership of the Prepayment Charges, each Class of LIBOR Certificates represents beneficial ownership of a regular interest in the Upper Tier REMIC and the right to receive Basis Risk CarryForward Amounts and the Class X Certificates represent beneficial ownership of a regular interest in the Upper Tier REMIC, the Excess Reserve Fund Account and the Interest Rate Cap

other parties hereto, constitutes or will constitute the legal, valid and binding agreement of the Depositor, enforceable against the Depositor in accordance with its terms, except as such enforcement may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the rights of creditors generally, and by general equity principles (regardless of whether such enforcement is considered in a proceeding in equity or at law);

(d) No consent, approval, authorization or order of or registration or filing with, or notice to, any governmental authority or court is required for the execution, delivery and performance of or compliance by the Depositor with this Agreement or the consummation by the Depositor of any of the transactions contemplated hereby, except as have been made on or prior to the Closing Date;

(e) None of the execution and delivery of this Agreement, the consummation of the transactions contemplated hereby or thereby, or the fulfillment of or compliance with the terms and conditions of this Agreement, (i) conflicts or will conflict with or results or will result in a breach of, or constitutes or will constitute a default or results or will result in an acceleration under (A) the charter or bylaws of the Depositor, or (B) of any term, condition or provision of any material indenture, deed of trust, contract or other agreement or instrument to which the Depositor or any of its subsidiaries is a party or by which it or any of its subsidiaries is bound; (ii) results or will result in a violation of any law, rule, regulation, order, judgment or decree applicable to the Depositor of any court or governmental authority having jurisdiction over the Depositor or its subsidiaries; or (iii) results in the creation or imposition of any lien, charge or encumbrance which would have a material adverse effect upon the Mortgage Loans or any documents or instruments evidencing or securing the Mortgage Loans;

(f) There are no actions, suits or proceedings before or against or investigations of, the Depositor pending, or to the knowledge of the Depositor, threatened, before any court, administrative agency or other tribunal, and no notice of any such action, which, in the Depositor's reasonable judgment, might materially and adversely affect the performance by the Depositor of its obligations under this Agreement, or the validity or enforceability of this Agreement;

(g) The Depositor is not in default with respect to any order or decree of any court or any order, regulation or demand of any federal, state, municipal or governmental agency that may materially and adversely affect its performance hereunder; and

(h) Immediately prior to the transfer and assignment by the Depositor to the Trustee on the Closing Date, the Depositor had good title to, and was the sole owner of each Mortgage Loan, free of any interest of any other Person, and the Depositor has transferred all right, title and interest in each Mortgage Loan to the Trustee. The transfer of the Mortgage Note and the Mortgage as and in the manner contemplated by this Agreement is sufficient either (i) fully to transfer to the Trustee, for the benefit of the Certificateholders, all right, title, and interest of the Depositor thereto as note holder and mortgagee or (ii) to grant to the Trustee, for the benefit of the Certificateholders, the security interest referred to in Section 10.04.

It is understood and agreed that the representations, warranties and covenants set forth in this Section 2.06 shall survive delivery of the respective Custodial Files to the Trustee and shall inure to the benefit of the Trustee.

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ARTICLE III

ADMINISTRATION AND SERVICING

OF MORTGAGE LOANS

Section 3.01 Servicers to Service Mortgage Loans. (a) For and on behalf of the Certificateholders, the Servicers shall service and administer the Mortgage Loans in accordance with the terms of this Agreement and the respective Mortgage Loans and, to the extent consistent with such terms, in the same manner in which it services and administers similar mortgage loans for its own portfolio, giving due consideration to customary and usual standards of practice of mortgage lenders and loan servicers administering similar mortgage loans but without regard to:

(i) any relationship that such Servicer, any Subservicer or any Affiliate of such Servicer or any Subservicer may have with the related Mortgagor;

(ii) the ownership or non-ownership of any Certificate by such Servicer or any Affiliate of such Servicer;

(iii) such Servicer's obligation to make P&I Advances or Servicing Advances; or

(iv) such Servicer's or any Subservicer's right to receive compensation for its services hereunder or with respect to any particular transaction.

To the extent consistent with the foregoing, each Servicer shall seek to maximize the timely and complete recovery of principal and interest on the Mortgage Notes. Subject only to the above-described servicing standards and the terms of this Agreement and of the respective Mortgage Loans, each Servicer shall have full power and authority, acting alone or through Subservicers as provided in Section 3.02, to do or cause to be done any and all things in connection with such servicing and administration which it may deem necessary or desirable. Without limiting the generality of the foregoing, each Servicer in its own name or in the name of a Subservicer is hereby authorized and empowered by the Trustee when the applicable Servicer believes it appropriate in its best judgment in accordance with Accepted Servicing Practices, to execute and deliver any and all instruments of satisfaction or cancellation, or of partial or full release or discharge, and all other comparable instruments, with respect to the Mortgage Loans and the Mortgaged Properties and to institute foreclosure proceedings or obtain a deed-in-lieu of foreclosure so as to convert the ownership of such properties, and to hold or cause to be held title to such properties, on behalf of the Trustee. Each Servicer shall service and administer the Mortgage Loans in accordance with applicable state and federal law and shall provide to the Mortgagors any reports required to be provided to them thereby. Each Servicer covenants that its computer and other systems used in servicing the Mortgage Loans operate in a manner such that the Servicer can service the Mortgage Loans in accordance with the terms of this Pooling and Servicing Agreement. Each Servicer shall also comply in the performance of this Agreement with all reasonable rules and requirements of each insurer under any standard hazard insurance policy. Subject to Section 3.16, the Trustee shall execute, at the written request of a Servicer, and furnish to such Servicer and any Subservicer such documents provided to the Trustee as are necessary or appropriate to enable such Servicer or any Subservicer to carry out its servicing and administrative duties hereunder, and the Trustee hereby grants to each Servicer, and this Agreement shall constitute, a power of attorney to carry out such duties, including a power of attorney in the form of Exhibit O hereto to take title to Mortgaged Properties after foreclosure in the name of and on behalf of the Trustee. The Trustee shall execute a separate power of attorney in favor of each Servicer for the purposes described herein to the extent necessary or desirable to enable each Servicer to perform its duties hereunder. The Trustee shall not be liable for the actions of any Servicer or any Subservicers under such powers of attorney. Notwithstanding anything contained herein to the contrary, no Servicer or Subservicer shall without the Trustee's consent: (i) initiate any action, suit or proceeding solely under the Trustee's name without indicating such Servicer's or Subservicer's, as applicable, representative

capacity, or (ii) take any action with the intent to, or which actually does cause, the Trustee to be registered to do business in any state.

(b) Subject to Section 3.09(b), in accordance with the standards of the preceding paragraph, each Servicer shall advance or cause to be advanced funds as necessary for the purpose of effecting the timely payment of taxes and assessments on the Mortgaged Properties, which advances shall be Servicing Advances reimbursable in the first instance from related collections from the Mortgagors pursuant to Section 3.09(b), and further as provided in Section 3.11. Any cost incurred by the Servicer or by Subservicers in effecting the timely payment of taxes and assessments on a Mortgaged Property shall not be added to the unpaid principal balance of the related Mortgage Loan, notwithstanding that the terms of such Mortgage Loan so permit.

(c) Notwithstanding anything in this Agreement to the contrary, a Servicer may not make any future advances with respect to a Mortgage Loan (except as provided in Section 4.01) and none of the Servicers shall (i) permit any modification with respect to any Mortgage Loan that would change the Mortgage Rate, reduce or increase the principal balance (except for reductions resulting from actual payments of principal) or change the final maturity date on such Mortgage Loan (except for a reduction of interest payments resulting from the application of the Servicemembers Civil Relief Act or any similar state statutes) or (ii) permit any modification, waiver or amendment of any term of any Mortgage Loan that would both (A) effect an exchange or reissuance of such Mortgage Loan under Section 1001 of the Code (or final, temporary or proposed Treasury regulations promulgated thereunder) and (B) cause either the Upper Tier REMIC or the Lower Tier REMIC to fail to qualify as a REMIC under the Code or the imposition of any tax on "prohibited transactions" or "contributions after the startup date" under the REMIC Provisions, or (iii) except as provided in Section 3.07(a), waive any Prepayment Charges.

(d) Each Servicer may delegate its responsibilities under this Agreement; provided, however, that no such delegation shall release that Servicer from the responsibilities or liabilities arising under this Agreement.

(e) In the event that the Mortgage Loan Documents relating to any Mortgage Loan contain provisions requiring the related Mortgagor to submit to binding arbitration any disputes arising in connection with such Mortgage Loan, the applicable Servicer shall be entitled to waive any such provisions on behalf of the Trust and to send written notice of such waiver to the related Mortgagor, although the Mortgagor may still require arbitration of such disputes at its option.

Section 3.02 Subservicing Agreements between a Servicer and Subservicers. (a) Each Servicer may enter into subservicing agreements with subservicers (each, a "Subservicer"), for the servicing and administration of the Mortgage Loans ("Subservicing Agreements"). The applicable Servicer shall, within a reasonable period of time, give notice to the Trustee of any such Subservicing Agreement. The Trustee shall not be required to review or consent to such Subservicing Agreements and shall have no liability in connection therewith.

(b) Each Subservicer shall be (i) authorized to transact business in the state or states in which the related Mortgaged Properties it is to service are situated, if and to the extent required by applicable law to enable the Subservicer to perform its obligations hereunder and under the Subservicing Agreement, (ii) an institution approved as a mortgage loan originator by the Federal Housing Administration or an institution that has deposit accounts insured by the FDIC and (iii) a Freddie Mac or Fannie Mae approved mortgage servicer. Each Subservicing Agreement must impose on the Subservicer requirements conforming to the provisions set forth in Section 3.08 and provide for servicing of the Mortgage Loans consistent with the terms of this Agreement. Each Servicer will examine each Subservicing Agreement to which it is a party and will be familiar with the terms thereof. The terms of any Subservicing Agreement will not be inconsistent with any of the provisions of this Agreement.

Each Servicer and the respective Subservicers may enter into and make amendments to the Subservicing Agreements or enter into different forms of Subservicing Agreements; provided, however, that any such amendments or different forms shall be consistent with and not violate the provisions of this Agreement, and that no such amendment or different form shall be made or entered into which could be reasonably expected to be materially adverse to the interests of the Trustee, without the consent of the Trustee. Any variation without the consent of the Trustee from the provisions set forth in Section 3.08 relating to insurance or priority requirements of Subservicing Accounts, or credits and charges to the Subservicing Accounts or the timing and amount of remittances by the Subservicers to such Servicer, are conclusively deemed to be inconsistent with this Agreement and therefore prohibited. Each Servicer shall deliver to the Trustee and the Depositor copies of all Subservicing Agreements, and any amendments or modifications thereof, promptly upon such Servicer's execution and delivery of such instruments.

(c) As part of its servicing activities hereunder, each Servicer (except as otherwise provided in the last sentence of this paragraph), for the benefit of the Trustee, shall enforce the obligations of each Subservicer under the related Subservicing Agreement to which such Servicer is a party, including, without limitation, any obligation to make advances in respect of delinquent payments as required by a Subservicing Agreement. Such enforcement, including, without limitation, the legal prosecution of claims, termination of Subservicing Agreements, and the pursuit of other appropriate remedies, shall be in such form and carried out to such an extent and at such time as such Servicer, in its good faith business judgment, would require were it the owner of the related Mortgage Loans. Each Servicer shall pay the costs of such enforcement at its own expense, and shall be reimbursed therefor only (i) from a general recovery resulting from such enforcement, to the extent, if any, that such recovery exceeds all amounts due in respect of the related Mortgage Loans or (ii) from a specific recovery of costs, expenses or attorneys' fees against the party against whom such enforcement is directed.

Section 3.03 Successor Subservicers. Each Servicer shall be entitled to terminate any Subservicing Agreement to which such Servicer is a party and the rights and obligations of any Subservicer pursuant to any such Subservicing Agreement in accordance with the terms and conditions of such Subservicing Agreement. In the event of termination of any Subservicer, all servicing obligations of such Subservicer shall be assumed simultaneously by the applicable Servicer party to the related Subservicing Agreement without any act or deed on the part of such Subservicer or such Servicer, and such Servicer either shall service directly the related Mortgage Loans or shall enter into a Subservicing Agreement with a successor Subservicer which qualifies under Section 3.02.

Any Subservicing Agreement shall include the provision that such agreement may be immediately terminated by the Depositor or the Trustee without fee, in accordance with the terms of this Agreement, in the event that the Servicer party to the related Subservicing Agreement shall, for any reason, no longer be a Servicer (including termination due to an Event of Default).

Section 3.04 Liability of the Servicers. Notwithstanding any Subservicing Agreement, any of the provisions of this Agreement relating to agreements or arrangements between a Servicer and a Subservicer or reference to actions taken through a Subservicer or otherwise, such Servicer shall remain obligated and primarily liable to the Trustee for the servicing and administering of the Mortgage Loans in accordance with the provisions of Section 3.01 without diminution of such obligation or liability by virtue of such Subservicing Agreements or arrangements or by virtue of indemnification from the Subservicer and to the same extent and under the same terms and conditions as if such Servicer alone were servicing and administering such Mortgage Loans. Each Servicer shall be entitled to enter into any agreement with a Subservicer for indemnification of such Servicer by such Subservicer and nothing contained in this Agreement shall be deemed to limit or modify such indemnification.

Section 3.05 No Contractual Relationship between Subservicers and the Trustee. Any Subservicing Agreement that may be entered into and any transactions or services relating to the Mortgage Loans involving a Subservicer in its capacity as such shall be deemed to be between the Subservicer and the related Servicer alone, and the Trustee (or any successor to such Servicer) shall not be deemed a party thereto and shall have no claims, rights, obligations, duties or liabilities with respect to the Subservicer except as set forth in Section 3.06. Each Servicer shall be solely liable for all fees owed by it to any Subservicer, irrespective of whether such Servicer's compensation pursuant to this Agreement is sufficient to pay such fees.

Section 3.06 Assumption or Termination of Subservicing Agreements by Trustee. In the event a Servicer at any time shall for any reason no longer be a Servicer (including by reason of the occurrence of an Event of Default), the Trustee, or its designee, or the successor Servicer if the successor is not the Trustee, shall thereupon assume all of the rights and obligations of such Servicer under each Subservicing Agreement that such Servicer may have entered into, with copies thereof provided to the Trustee, or the successor Servicer if the successor is not the Trustee, prior to the Trustee, or the successor Servicer if the successor is not the Trustee, assuming such rights and obligations, unless the Trustee elects to terminate any Subservicing Agreement in accordance with its terms as provided in Section 3.03.

Upon such assumption, the Trustee, its designee or the successor Servicer shall be deemed, subject to Section 3.03, to have assumed all of such Servicer's interest therein and to have replaced such Servicer as a party to each Subservicing Agreement to which the predecessor Servicer was a party to the same extent as if each Subservicing Agreement had been assigned to the assuming party, except that (i) such Servicer shall not thereby be relieved of any liability or obligations under any such Subservicing Agreement that arose before it ceased to be a Servicer and (ii) none of the Depositor, the Trustee, their designees or any successor to such Servicer shall be deemed to have assumed any liability or obligation of such Servicer that arose before it ceased to be a Servicer.

Such Servicer at its expense shall, upon request of the Trustee, its designee or the successor Servicer deliver to the assuming party all documents and records relating to each Subservicing Agreement to which it is a party and the Mortgage Loans then being serviced by it and an accounting of amounts collected and held by or on behalf of it, and otherwise use its best efforts to effect the orderly and efficient transfer of the Subservicing Agreements to the assuming party.

Section 3.07 Collection of Certain Mortgage Loan Payments. (a) Each Servicer shall make reasonable efforts to collect all payments called for under the terms and provisions of the Mortgage Loans, and shall, to the extent such procedures shall be consistent with this Agreement and the terms and provisions of any applicable Insurance Policies, follow such collection procedures as it would follow with respect to mortgage loans comparable to the Mortgage Loans and held for its own account. Consistent with the foregoing and Accepted Servicing Practices, each Servicer may (i) waive any late payment charge or, if applicable, any penalty interest, or (ii) extend the due dates for the Scheduled Payments due on a Mortgage Note for a period of not greater than 180 days; provided that any extension pursuant to clause (ii) above shall not affect the amortization schedule of any Mortgage Loan for purposes of any computation hereunder, except as provided below. In the event of any such arrangement pursuant to clause (ii) above, the Servicer shall make timely advances on such Mortgage Loan during such extension pursuant to Section 4.01 and in accordance with the amortization schedule of such Mortgage Loan without modification thereof by reason of such arrangements, subject to Section 4.01(d) pursuant to which the Servicer shall not be required to make any such advances that are Nonrecoverable P&I Advances. Notwithstanding the foregoing, the Servicer may waive, in whole or in part, a Prepayment Charge only under the following circumstances: (i) such waiver relates to a default or a reasonably foreseeable default and would, in the reasonable judgment of the Servicer, maximize recovery

of total proceeds taking into account the value of such Prepayment Charge and the related Mortgage Loan, (ii) such Prepayment Charge is not permitted to be collected by applicable federal, state or local law or regulation or (iii) the collection of such Prepayment Charge would be considered "predatory" pursuant to written guidance published or issued by any applicable federal, state or local regulatory authority acting in its official capacity and having jurisdiction over such matters. If a Prepayment Charge is waived other than as permitted by the prior sentence, then the applicable Servicer is required to pay the amount of such waived Prepayment Charge, for the benefit of the Holders of the Class P Certificates, by depositing such amount into the related Collection Account together with and at the time that the amount prepaid on the related Mortgage Loan is required to be deposited into the Collection Account; provided, however, that the applicable Servicer shall not have an obligation to pay the amount of any uncollected Prepayment Charge if the failure to collect such amount is the direct result of inaccurate or incomplete information on the Mortgage Loan Schedule in effect at such time.

(b) (i) The Trustee shall establish and maintain the Excess Reserve Fund Account, on behalf of the Class X Certificateholders, to receive any Basis Risk Payment and any Interest Rate Cap Payment and to secure their limited recourse obligation to pay to the LIBOR Certificateholders Basis Risk CarryForward Amounts.

(ii) On each Distribution Date, the Trustee shall deposit the amount of any Basis Risk Payment and any Interest Rate Cap Payment for such date into the Excess Reserve Fund Account.

(c) (i) On each Distribution Date on which there exists a Basis Risk CarryForward Amount on any Class of Certificates, the Trustee shall (1) withdraw from the Distribution Account and deposit in the Excess Reserve Fund Account, as set forth in Section 4.02(a)(iii)(S), the lesser of (x) the Class X Distributable Amount (without regard to the reduction in the definition thereof with respect to the Basis Risk Payment) (to the extent remaining after the distributions specified in Sections 4.02(a)(iii)(A)-(R)) and (y) the aggregate Basis Risk CarryForward Amounts for such Distribution Date and (2) withdraw from the Excess Reserve Fund Account amounts necessary to pay to such Class or Classes of Certificates the Basis Risk CarryForward Amount. Such payments shall be allocated to those Classes on a pro rata basis based upon the amount of Basis Risk CarryForward Amount owed to each such Class and shall be paid in the priority set forth in Sections 4.02(a)(iii)(T)-(U).

(ii) The Trustee shall account for the Excess Reserve Fund Account as an asset of a grantor trust under subpart E, Part I of the subchapter J of the Code and not an asset of any REMIC created pursuant to this Agreement. The beneficial owners of the Excess Reserve Fund Account are the Class X Certificateholders. For all federal tax purposes, amounts transferred by the Upper Tier REMIC to the Excess Reserve Fund Account shall be treated as distributions by the Trustee to the Class X Certificateholders.

(iii) Any Basis Risk CarryForward Amounts paid by the Trustee to the LIBOR Certificateholders shall be accounted for by the Trustee as amounts paid first to the Holders of the Class X Certificates and then to the respective Class or Classes of LIBOR Certificates. In addition, the Trustee shall account for the LIBOR Certificateholders' rights to receive payments of Basis Risk CarryForward Amounts as rights in a limited recourse interest rate cap contract written by the Class X Certificateholders in favor of the LIBOR Certificateholders.

(iv) Notwithstanding any provision contained in this Agreement, the Trustee shall not be required to make any payments from the Excess Reserve Fund Account except as expressly set forth in this Section 3.07(c) and Sections 4.02(a)(iii)(T)-(V).

(d) The Trustee shall establish and maintain the Distribution

Account on behalf of the Certificateholders. The Depositor shall cause the Closing Date Deposit Amount to be deposited into the Distribution Account on the Closing Date. The Trustee shall, promptly upon receipt, deposit in the Distribution Account and retain therein the following:

(i) the aggregate amount remitted by the Servicers to the Trustee pursuant to Section 3.11;

(ii) any amount deposited by the Servicers pursuant to Section 3.12(b) in connection with any losses on Permitted Investments; and

(iii) any other amounts deposited hereunder which are required to be deposited in the Distribution Account.

In the event that any Servicer shall remit any amount not required to be remitted, it may at any time direct the Trustee in writing to withdraw such amount from the Distribution Account, any provision herein to the contrary notwithstanding. Such direction may be accomplished by delivering notice to the Trustee which describes the amounts deposited in error in the Distribution Account. All funds deposited in the Distribution Account shall be held by the Trustee in trust for the Certificateholders until disbursed in accordance with this Agreement or withdrawn in accordance with Section 4.02.

(e) The Trustee may invest the funds in the Distribution Account, in one or more Permitted Investments, in accordance with Section 3.12. Each Servicer shall direct the Trustee to withdraw from the Distribution Account and to remit to such Servicer no less than monthly, all income and gain realized from the investment of the portion of funds deposited in the Distribution Account by such Servicer (except during the Trustee Float Period). The Trustee may withdraw from the Distribution Account any income or gain earned from the investment of funds deposited therein during the Trustee Float Period for its own benefit.

(f) Each Servicer shall give notice to the Trustee of any proposed change of the location of the related Collection Account within a reasonable period of time prior to any change thereof and the Trustee shall forward such notice to the Rating Agencies and the Depositor.

(g) In order to comply with its duties under the USA Patriot Act of 2001, the Trustee shall obtain and verify certain information and documentation from the other parties to this Agreement including, but not limited to, each such party's name, address, and other identifying information.

Section 3.08 Subservicing Accounts. In those cases where a Subservicer is servicing a Mortgage Loan pursuant to a Subservicing Agreement, the Subservicer will be required to establish and maintain one or more accounts (collectively, the "Subservicing Account"). The Subservicing Account shall be an Eligible Account and shall otherwise be acceptable to the related Servicer. The Subservicer shall deposit in the clearing account (which account must be an Eligible Account) in which it customarily deposits payments and collections on mortgage loans in connection with its mortgage loan servicing activities on a daily basis, and in no event more than one Business Day after the Subservicer's receipt thereof, all proceeds of Mortgage Loans received by the Subservicer less its servicing compensation to the extent permitted by the Subservicing Agreement, and shall thereafter deposit such amounts in the Subservicing Account, in no event more than two Business Days after the deposit of such funds into the clearing account. The Subservicer shall thereafter deposit such proceeds in the Collection Account of the related Servicer or remit such proceeds to the related Servicer for deposit in the Collection Account of the related Servicer not later than two Business Days after the deposit of such amounts in the Subservicing Account. For purposes of this Agreement, such Servicer shall be deemed to have received payments on the Mortgage Loans when the Subservicer receives such payments.

Section 3.09 Collection of Taxes, Assessments and Similar Items;

Escrow Accounts. (a) Each Servicer shall enforce the obligations under each paid-in-full, life-of-the-loan tax service contract in effect with respect to each First Lien Mortgage Loan (each, a "Tax Service Contract") serviced by such Servicer. Each Tax Service Contract shall be assigned to the Trustee, or a successor Servicer at the applicable Servicer's expense in the event that the Servicer is terminated as Servicer of the related Mortgage Loan.

(b) To the extent that the services described in this paragraph (b) are not otherwise provided pursuant to the Tax Service Contracts described in paragraph (a) above, each Servicer undertakes to perform such functions with respect to the Mortgage Loans serviced by such Servicer. To the extent the related Mortgage provides for Escrow Payments, the related Servicer shall establish and maintain, or cause to be established and maintained, one or more accounts (the "Escrow Accounts"), which shall be Eligible Accounts. Each Servicer shall deposit in the clearing account (which account must be an Eligible Account) in which it customarily deposits payments and collections on mortgage loans in connection with its mortgage loan servicing activities on a daily basis, and in no event more than one Business Day after the Servicer's receipt thereof, all collections from the Mortgagors (or related advances from Subservicers) for the payment of taxes, assessments, hazard insurance premiums and comparable items for the account of the Mortgagors ("Escrow Payments") collected on account of the Mortgage Loans and shall thereafter deposit such Escrow Payments in the Escrow Accounts, in no event more than two Business Days after the deposit of such funds in the clearing account, for the purpose of effecting the payment of any such items as required under the terms of this Agreement. Withdrawals of amounts from an Escrow Account may be made only to (i) effect payment of taxes, assessments, hazard insurance premiums, and comparable items; (ii) reimburse such Servicer (or a Subservicer to the extent provided in the related Subservicing Agreement) out of related collections for any advances made pursuant to Section 3.01 (with respect to taxes and assessments) and Section 3.13 (with respect to hazard insurance); (iii) refund to Mortgagors any sums as may be determined to be overages; (iv) pay interest, if required and as described below, to Mortgagors on balances in the Escrow Account; (v) clear and terminate the Escrow Account at the termination of such Servicer's obligations and responsibilities in respect of the Mortgage Loans under this Agreement or (vi) recover amounts deposited in error. As part of its servicing duties, such Servicer or Subservicers shall pay to the Mortgagors interest on funds in Escrow Accounts, to the extent required by law and, to the extent that interest earned on funds in the Escrow Accounts is insufficient, to pay such interest from its or their own funds, without any reimbursement therefor. To the extent that a Mortgage does not provide for Escrow Payments, the applicable Servicer shall determine whether any such payments are made by the Mortgagor in a manner and at a time that avoids the loss of the Mortgaged Property due to a tax sale or the foreclosure of a tax lien. The applicable Servicer assumes full responsibility for the payment of all such bills within such time and shall effect payments of all such bills irrespective of the Mortgagor's faithful performance in the payment of same or the making of the Escrow Payments and shall make advances from its own funds to effect such payments; provided, however, that such advances are deemed to be Servicing Advances.

Section 3.10 Collection Accounts. (a) On behalf of the Trustee, each Servicer shall establish and maintain, or cause to be established and maintained, one or more separate Eligible Accounts (each such account or accounts, a "Collection Account"), held in trust for the benefit of the Trustee. On behalf of the Trustee, each Servicer shall deposit or cause to be deposited in the clearing account (which account must be an Eligible Account) in which it customarily deposits payments and collections on mortgage loans in connection with its mortgage loan servicing activities on a daily basis, and in no event more than one Business Day after such Servicer's receipt thereof, and shall thereafter deposit in the related Collection Account, in no event more than two Business Days after the deposit of such funds into the clearing account, as and when received or as otherwise required hereunder, the following payments and collections received or made by it subsequent to the Cut-off Date (other than in respect of principal or interest on the related Mortgage Loans due on or before the Cut-off Date), or payments (other than Principal Prepayments) received by it

on or prior to the related Cut-off Date but allocable to a Due Period subsequent thereto:

(i) all payments on account of principal, including Principal Prepayments, on the Mortgage Loans;

(ii) all payments on account of interest (net of the related Servicing Fee) on each Mortgage Loan;

(iii) all Insurance Proceeds and Condemnation Proceeds to the extent such Insurance Proceeds and Condemnation Proceeds are not to be applied to the restoration of the related Mortgaged Property or released to the related Mortgagor in accordance with the express requirements of law or in accordance with Accepted Servicing Practices and Liquidation Proceeds;

(iv) any amounts required to be deposited pursuant to Section 3.12 in connection with any losses realized on Permitted Investments with respect to funds held in the related Collection Account;

(v) any amounts required to be deposited by such Servicer pursuant to the second paragraph of Section 3.13(a) in respect of any blanket policy deductibles;

(vi) all proceeds of any Mortgage Loan repurchased or purchased in accordance with this Agreement; and

(vii) all Prepayment Charges collected or paid (pursuant to Section 3.07(a)) by such Servicer.

The foregoing requirements for deposit in the Collection Accounts shall be exclusive, it being understood and agreed that, without limiting the generality of the foregoing, payments in the nature of late payment charges, NSF fees, reconveyance fees, assumption fees and other similar fees and charges need not be deposited by each Servicer in the related Collection Account and shall, upon collection, belong to the applicable Servicer as additional compensation for its servicing activities. In the event a Servicer shall deposit in the related Collection Account any amount not required to be deposited therein, it may at any time withdraw such amount from its Collection Account, any provision herein to the contrary notwithstanding.

(b) Funds in the Collection Accounts may be invested in Permitted Investments in accordance with the provisions set forth in Section 3.12. Each Servicer shall give notice to the Trustee of the location of the related Collection Account maintained by it when established and prior to any change thereof in accordance with Section 3.07(f).

Section 3.11 Withdrawals from the Collection Accounts. (a) Each Servicer shall, from time to time, make withdrawals from the related Collection Account for any of the following purposes or as described in Section 4.01:

(i) on or prior to each Remittance Date, to remit to the Trustee (A) the Trustee Fee with respect to such Distribution Date and (B) all Available Funds in respect of the related Distribution Date together with all amounts representing Prepayment Charges from the Mortgage Loans received during the related Prepayment Period;

(ii) to reimburse such Servicer for P&I Advances, but only to the extent of amounts received which represent Late Collections (net of the related Servicing Fees) of Scheduled Payments on Mortgage Loans with respect to which such P&I Advances were made in accordance with the provisions of Section 4.01 (such Servicer's right for recovery or reimbursement has priority over the Trust);

(iii) to pay such Servicer or any Subservicer (a) any unpaid Servicing Fees or (b) any unreimbursed Servicing Advances with respect to

each Mortgage Loan serviced by such Servicer or Subservicer, but only to the extent of any Late Collections, Liquidation Proceeds, Condemnation Proceeds, Insurance Proceeds or other amounts as may be collected by the Servicer from a Mortgagor, or otherwise received with respect to such Mortgage Loan (or the related REO Property) (such Servicer's right for recovery or reimbursement has priority over the Trust);

(iv) to pay to such Servicer as servicing compensation (in addition to the Servicing Fee) on the Remittance Date any interest or investment income earned on funds deposited in its Collection Account;

(v) to pay to the applicable Responsible Party or the Depositor, as applicable, with respect to each Mortgage Loan that has previously been repurchased or replaced pursuant to this Agreement, all amounts received thereon subsequent to the date of purchase or substitution, as further described herein;

(vi) to reimburse such Servicer for (A) any P&I Advance or Servicing Advance previously made which such Servicer has determined to be a Nonrecoverable P&I Advance or Nonrecoverable Servicing Advance in accordance with the provisions of Section 4.01 and (B) any unpaid Servicing Fees related to any Second Lien Mortgage Loan to the extent not recoverable from Liquidation Proceeds, Insurance Proceeds or other amounts received with respect to the related Second Lien Mortgage Loan under Section 3.11(a)(iii) (such Servicer's right for recovery or reimbursement has priority over the Trust);

(vii) to pay, or to reimburse such Servicer for advances in respect of, expenses incurred in connection with any Mortgage Loan serviced by such Servicer pursuant to Section 3.15 (such Servicer's right for recovery or reimbursement has priority over the Trust);

(viii) to reimburse such Servicer or the Depositor for expenses incurred by or reimbursable to such Servicer or the Depositor, as the case may be, pursuant to Section 6.03 (such Servicer's right for recovery or reimbursement has priority over the Trust);

(ix) to reimburse such Servicer or the Trustee, as the case may be, for expenses reasonably incurred in respect of the breach or defect giving rise to the repurchase obligation of any Responsible Party or the Depositor, as applicable, that were included in the Repurchase Price of the Mortgage Loan, including any expenses arising out of the enforcement of the repurchase obligation, to the extent not otherwise paid pursuant to the terms hereof (such Servicer's right for recovery or reimbursement has priority over the Trust);

(x) to withdraw any amounts deposited in the related Collection Account in error;

(xi) to withdraw any amounts held in the related Collection Account and not required to be remitted to the Trustee on the Remittance Date occurring in the month in which such amounts are deposited into such Collection Account, to reimburse such Servicer for unreimbursed P&I Advances;

(xii) to invest funds in Permitted Investments in accordance with Section 3.12; and

(xiii) to clear and terminate the related Collection Account upon termination of this Agreement;

(b) Each Servicer shall keep and maintain separate accounting, on a Mortgage Loan by Mortgage Loan basis, for the purpose of justifying any withdrawal from the related Collection Account, to the extent held by or on behalf of it, pursuant to subclauses (a)(ii), (iii), (v), (vi), (vii), (viii)

and (ix) above. Each Servicer shall provide written notification (as set forth in Section 4.01(d)) to the Trustee, on or prior to the next succeeding Remittance Date, upon making any withdrawals from the related Collection Account pursuant to subclause (a)(vi) above.

Section 3.12 Investment of Funds in the Collection Accounts and the Distribution Account. (a) Each Servicer may invest the funds in the related Collection Account and the Trustee may (but is not obligated to) invest funds in the Distribution Account during the Trustee Float Period, and, with respect to the portion of funds in the Distribution Account deposited by a Servicer, shall (except during the Trustee Float Period) invest such funds in the Distribution Account at the direction of such Servicer (for purposes of this Section 3.12, such Accounts are referred to as an "Investment Account"), in one or more Permitted Investments bearing interest or sold at a discount, and maturing, unless payable on demand no later than the Business Day immediately preceding the date on which such funds are required to be withdrawn from such account pursuant to this Agreement; provided, however, that the Trustee shall have no obligation to invest funds deposited into the Distribution Account by a Servicer on the Remittance Date later than 10:00 a.m. (Pacific Standard Time). If no investment instruction is given in a timely manner, the Trustee shall hold the funds in the Distribution Account uninvested. All such Permitted Investments shall be held to maturity, unless payable on demand. Any investment of funds in an Investment Account (other than investments made during the Trustee Float Period) shall be made in the name of the applicable Servicer. The applicable Servicer shall be entitled to sole possession (except with respect to investment direction of funds and any income and gain realized on any investment in the Distribution Account during the Trustee Float Period) over each such related investment, and any certificate or other instrument evidencing any such investment shall be delivered directly to the applicable Servicer (with a copy to the Trustee or its agent if related to investment of funds in the Distribution Account not during the Trustee Float Period), or with respect to investments during the Trustee Float Period, the Trustee or its agent, together with any document of transfer necessary to transfer title to such investment to the applicable Servicer, or with respect to investments during the Trustee Float Period, the Trustee or its agent. In the event amounts on deposit in an Investment Account are at any time invested in a Permitted Investment payable on demand, the applicable Servicer, or with respect to investments during the Trustee Float Period, the Trustee may:

(x) consistent with any notice required to be given thereunder, demand that payment thereon be made on the last day such Permitted Investment may otherwise mature hereunder in an amount equal to the lesser of (1) all amounts then payable thereunder and (2) the amount required to be withdrawn on such date; and

(y) demand payment of all amounts due thereunder that such Permitted Investment would not constitute a Permitted Investment in respect of funds thereafter on deposit in an Investment Account.

(b) All income and gain realized from the investment of funds deposited in the related Collection Account held by or on behalf of the related Servicer, shall be for the benefit of such Servicer and shall be subject to its withdrawal in the manner set forth in Section 3.11. Such Servicer shall deposit in its Collection Account the amount of any loss of principal incurred in respect of any such Permitted Investment made with funds in such accounts immediately upon realization of such loss.

(c) All income and gain realized from the investment of the portion of funds deposited in the Distribution Account by a Servicer and held by the Trustee, shall be for the benefit of such Servicer (except for any income or gain realized from the investment of funds on deposit in the Distribution Account during the Trustee Float Period, which shall be for the benefit of the Trustee) and shall be subject to the Trustee's withdrawal in the manner set

forth in Section 3.07(a). Each Servicer shall deposit in the Distribution Account (except with respect to losses incurred during the Trustee Float Period) the amount of any loss of principal incurred in respect of any such related Permitted Investment made with funds in such accounts immediately upon realization of such loss.

(d) Except as otherwise expressly provided in this Agreement, if any default occurs in the making of a payment due under any Permitted Investment, or if a default occurs in any other performance required under any Permitted Investment, the Trustee shall take such action as may be appropriate to enforce such payment or performance, including the institution and prosecution of appropriate proceedings.

(e) The Trustee shall not be liable for the amount of any loss incurred with respect of any investment or lack of investment of funds held in any Investment Account or the Distribution Account (except that if any losses are incurred from the investment of funds deposited in the Distribution Account during the Trustee Float Period, the Trustee shall be responsible for reimbursing the Trust for such loss) if made in accordance with this Section 3.12.

(f) The Trustee or its Affiliates shall be permitted to receive additional compensation that could be deemed to be in the Trustee's economic self-interest for (i) serving as investment adviser, administrator, shareholder, servicing agent, custodian or sub-custodian with respect to certain of the Permitted Investments, (ii) using Affiliates to effect transactions in certain Permitted Investments and (iii) effecting transactions in certain Permitted Investments. Such compensation shall not be considered an amount that is reimbursable or payable pursuant to this Agreement.

Section 3.13 Maintenance of Hazard Insurance and Errors and Omissions and Fidelity Coverage. (a) Each Servicer shall cause to be maintained for each Mortgage Loan serviced by such Servicer fire insurance with extended coverage on the related Mortgaged Property in an amount which is at least equal to the least of (i) the outstanding principal balance of such Mortgage Loan, (ii) the amount necessary to fully compensate for any damage or loss to the improvements that are a part of such property on a replacement cost basis and (iii) the maximum insurable value of the improvements which are a part of such Mortgaged Property, in each case in an amount not less than such amount as is necessary to avoid the application of any coinsurance clause contained in the related hazard insurance policy. Each Servicer shall also cause to be maintained fire insurance with extended coverage on each REO Property serviced by such Servicer in an amount which is at least equal to the lesser of (i) the maximum insurable value of the improvements which are a part of such property and (ii) the outstanding principal balance of the related Mortgage Loan at the time it became an REO Property, plus accrued interest at the Mortgage Rate and related Servicing Advances. Each Servicer will comply in the performance of this Agreement with all reasonable rules and requirements of each insurer under any such hazard policies. Any amounts to be collected by any Servicer under any such policies (other than amounts to be applied to the restoration or repair of the property subject to the related Mortgage or amounts to be released to the Mortgagor in accordance with the procedures that such Servicer would follow in servicing loans held for its own account, subject to the terms and conditions of the related Mortgage and Mortgage Note) shall be deposited in the related Collection Account, subject to withdrawal pursuant to Section 3.11. Any cost incurred by the Servicer in maintaining any such insurance shall not, for the purpose of calculating distributions to the Trustee, be added to the unpaid principal balance of the related Mortgage Loan, notwithstanding that the terms of such Mortgage Loan so permit. It is understood and agreed that no earthquake or other additional insurance is to be required of any Mortgagor other than pursuant to such applicable laws and regulations as shall at any time be in force and as shall require such additional insurance. If the Mortgaged Property or REO Property is at any time in an area identified in the Federal Register by the Federal Emergency Management Agency as having special flood hazards and flood insurance has been made available, the applicable Servicer will cause to

be maintained a flood insurance policy in respect thereof. Such flood insurance shall be in an amount equal to the lesser of (i) the unpaid principal balance of the related Mortgage Loan and (ii) the maximum amount of such insurance available for the related Mortgaged Property under the national flood insurance program (assuming that the area in which such Mortgaged Property is located is participating in such program).

In the event that any Servicer shall obtain and maintain a blanket policy with an insurer either (i) acceptable to Fannie Mae or Freddie Mac or (ii) having a General Policy Rating of A:X or better from Best's (or such other rating that is comparable to such rating) insuring against hazard losses on all of the Mortgage Loans, it shall conclusively be deemed to have satisfied its obligations as set forth in the first two sentences of this Section 3.13, it being understood and agreed that such policy may contain a deductible clause, in which case the Servicer shall, in the event that there shall not have been maintained on the related Mortgaged Property or REO Property a policy complying with the first two sentences of this Section 3.13, and there shall have been one or more losses which would have been covered by such policy, deposit to the related Collection Account from its own funds the amount not otherwise payable under the blanket policy because of such deductible clause. In connection with its activities as administrator and servicer of the Mortgage Loans, each Servicer agrees to prepare and present, on behalf of itself and the Trustee claims under any such blanket policy in a timely fashion in accordance with the terms of such policy.

(b) Each Servicer shall keep in force during the term of this Agreement a policy or policies of insurance covering errors and omissions for failure in the performance of such Servicer's obligations under this Agreement, which policy or policies shall be in such form and amount that would meet the requirements of Fannie Mae or Freddie Mac if it were the purchaser of the Mortgage Loans, unless such Servicer has obtained a waiver of such requirements from Fannie Mae or Freddie Mac. Each Servicer shall also maintain a fidelity bond in the form and amount that would meet the requirements of Fannie Mae or Freddie Mac, unless the Servicer has obtained a waiver of such requirements from Fannie Mae or Freddie Mac. Each Servicer shall provide the Trustee upon request with copies of any such insurance policies and fidelity bond. Each Servicer shall be deemed to have complied with this provision if an Affiliate of the Servicer has such errors and omissions and fidelity bond coverage and, by the terms of such insurance policy or fidelity bond, the coverage afforded thereunder extends to such Servicer. Any such errors and omissions policy and fidelity bond shall by its terms not be cancelable without thirty days' prior written notice to the Trustee. Each Servicer shall also cause each Subservicer to maintain a policy of insurance covering errors and omissions and a fidelity bond which would meet such requirements.

Section 3.14 Enforcement of Due-on-Sale Clauses; Assumption Agreements. Each Servicer will, to the extent it has knowledge of any conveyance or prospective conveyance of any Mortgaged Property by any Mortgagor (whether by absolute conveyance or by contract of sale, and whether or not the Mortgagor remains or is to remain liable under the Mortgage Note and/or the Mortgage), exercise its rights to accelerate the maturity of such Mortgage Loan under the "Due-on-Sale" clause, if any, applicable thereto; provided, however, that no Servicer shall be required to take such action if, in its sole business judgment, the Servicer believes it is not in the best interests of the Trust Fund and shall not exercise any such rights if prohibited by law from doing so. If a Servicer reasonably believes it is unable under applicable law to enforce such "Due-on-Sale" clause or if any of the other conditions set forth in the proviso to the preceding sentence apply, such Servicer will enter into an assumption and modification agreement from or with the person to whom such property has been conveyed or is proposed to be conveyed, pursuant to which such person becomes liable under the Mortgage Note and, to the extent permitted by applicable state law, the Mortgagor remains liable thereon. Each Servicer is also authorized to enter into a substitution of liability agreement with such person, pursuant to which the original Mortgagor is released from liability and such person is substituted as the Mortgagor and becomes liable under the

Mortgage Note; provided, that no such substitution shall be effective unless such person satisfies the underwriting criteria of such Servicer and such substitution is in the best interest of the Certificateholders as determined by such Servicer. In connection with any assumption, modification or substitution, such Servicer shall apply such underwriting standards and follow such practices and procedures as shall be normal and usual in its general mortgage servicing activities and as it applies to other mortgage loans owned solely by it. No Servicer shall take or enter into any assumption and modification agreement, however, unless (to the extent practicable in the circumstances) it shall have received confirmation, in writing, of the continued effectiveness of any applicable hazard insurance policy, or a new policy meeting the requirements of this Section is obtained. Any fee collected by a Servicer in respect of an assumption or substitution of liability agreement will be retained by such Servicer as additional servicing compensation. In connection with any such assumption, no material term of the Mortgage Note (including but not limited to the related Mortgage Rate and the amount of the Scheduled Payment) may be amended or modified, except as otherwise required pursuant to the terms thereof. Each Servicer shall notify the Trustee that any such substitution, modification or assumption agreement has been completed by forwarding to the Trustee the executed original of such substitution or assumption agreement, which document shall be added to the related Mortgage File and shall, for all purposes, be considered a part of such Mortgage File to the same extent as all other documents and instruments constituting a part thereof.

Notwithstanding the foregoing paragraph or any other provision of this Agreement, a Servicer shall not be deemed to be in default, breach or any other violation of its obligations hereunder by reason of any assumption of a Mortgage Loan by operation of law or by the terms of the Mortgage Note or any assumption which such Servicer may be restricted by law from preventing, for any reason whatsoever. For purposes of this Section 3.14, the term "assumption" is deemed to also include a sale (of the Mortgaged Property) subject to the Mortgage that is not accompanied by an assumption or substitution of liability agreement.

Section 3.15 Realization upon Defaulted Mortgage Loans. Each Servicer shall use its best efforts, consistent with Accepted Servicing Practices, to foreclose upon or otherwise comparably convert (which may include an acquisition of REO Property) the ownership of properties securing such of the Mortgage Loans as come into and continue in default and as to which no satisfactory arrangements can be made for collection of delinquent payments pursuant to Section 3.07, and which are not released from this Agreement pursuant to any other provision hereof. Each Servicer shall use reasonable efforts to realize upon such defaulted Mortgage Loans in such manner as will maximize the receipt of principal and interest by the Trustee, taking into account, among other things, the timing of foreclosure proceedings; provided, however, with respect to any Second Lien Mortgage Loan for which the related first lien mortgage loan is not included in the Trust Fund, if, after such Mortgage Loan becomes 180 days or more delinquent, the applicable Servicer determines that a significant net recovery is not possible through foreclosure, such Mortgage Loan may be charged off and the Mortgage Loan will be treated as a Liquidated Mortgage Loan giving rise to a Realized Loss. The foregoing is subject to the provisions that, in any case in which Mortgaged Property shall have suffered damage from an uninsured cause, a Servicer shall not be required to expend its own funds toward the restoration of such property unless it shall determine in its sole discretion (i) that such restoration will increase the net proceeds of liquidation of the related Mortgage Loan to the Trustee, after reimbursement to itself for such expenses, and (ii) that such expenses will be recoverable by such Servicer through Insurance Proceeds, Condemnation Proceeds or Liquidation Proceeds from the related Mortgaged Property, as contemplated in Section 3.11. Each Servicer shall be responsible for all other costs and expenses incurred by it in any such proceedings; provided, however, that it shall be entitled to reimbursement thereof from the related property, as contemplated in Section 3.11.

The proceeds of any liquidation or REO Disposition, as well as any

recovery resulting from a partial collection of Insurance Proceeds, Condemnation Proceeds or Liquidation Proceeds or any income from an REO Property, will be applied in the following order of priority: first, to reimburse the applicable Servicer or any Subservicer for any related unreimbursed Servicing Advances, pursuant to Section 3.11 or 3.17; second, to reimburse the applicable Servicer for any related unreimbursed P&I Advances, pursuant to Section 3.11; third, to accrued and unpaid interest on the Mortgage Loan or REO Imputed Interest, at the Mortgage Rate, to the date of the liquidation or REO Disposition, or to the Due Date prior to the Remittance Date on which such amounts are to be distributed if not in connection with a liquidation or REO Disposition; and fourth, as a recovery of principal of the Mortgage Loan. If the amount of the recovery so allocated to interest is less than a full recovery thereof, that amount will be allocated as follows: first, to unpaid Servicing Fees; and second, as interest at the Mortgage Rate (net of the Servicing Fee Rate). The portion of the recovery so allocated to unpaid Servicing Fees shall be reimbursed to the applicable Servicer or any Subservicer pursuant to Section 3.11 or 3.17. The portions of the recovery so allocated to interest at the Mortgage Rate (net of the Servicing Fee Rate) and to principal of the Mortgage Loan shall be applied as follows: first, to reimburse the applicable Servicer or any Subservicer for any related unreimbursed Servicing Advances in accordance with Section 3.11 or 3.17, and second, to the Trustee in accordance with the provisions of Section 4.02, subject to the last paragraph of Section 3.17 with respect to certain excess recoveries from an REO Disposition.

Notwithstanding anything to the contrary contained herein, in connection with a foreclosure or acceptance of a deed in lieu of foreclosure, in the event a Servicer has received actual notice of, or has actual knowledge of the presence of, hazardous or toxic substances or wastes on the related Mortgaged Property, or if the Trustee otherwise requests, such Servicer shall cause an environmental inspection or review of such Mortgaged Property to be conducted by a qualified inspector. Upon completion of the inspection, such Servicer shall promptly provide the Trustee and the Depositor with a written report of the environmental inspection.

After reviewing the environmental inspection report, the applicable Servicer shall determine, consistent with Accepted Servicing Practices, how to proceed with respect to the Mortgaged Property. In the event (a) the environmental inspection report indicates that the Mortgaged Property is contaminated by hazardous or toxic substances or wastes and (b) such Servicer determines, consistent with Accepted Servicing Practices, to proceed with foreclosure or acceptance of a deed in lieu of foreclosure, such Servicer shall be reimbursed for all reasonable costs associated with such foreclosure or acceptance of a deed in lieu of foreclosure and any related environmental clean-up costs, as applicable, from the related Liquidation Proceeds, or if the Liquidation Proceeds are insufficient to fully reimburse such Servicer, such Servicer shall be entitled to be reimbursed from amounts in the related Collection Account pursuant to Section 3.11. In the event such Servicer determines not to proceed with foreclosure or acceptance of a deed in lieu of foreclosure, such Servicer shall be reimbursed from general collections for all Servicing Advances made with respect to the related Mortgaged Property from the related Collection Account pursuant to Section 3.11.

In the event that HomEq elects to charge-off a Second Lien Mortgage Loan 180 days or more delinquent pursuant to this Section 3.15, no Second Lien Mortgage Loan shall be characterized as a Liquidated Mortgage Loan, unless the Depositor consents in writing to such characterization after HomEq has provided the Depositor with a combined equity analysis of such Second Lien Mortgage Loan and the related first lien mortgage loan; provided, that if the Depositor has failed to notify HomEq within 3 Business Days of receipt of such combined equity analysis, then the Depositor shall be deemed to have consented to such characterization. JPMorgan may elect to charge-off a Second Lien Mortgage Loan pursuant to this Section 3.15 without such written consent, so long as such Second Lien Mortgage Loan is 180 days or more delinquent.

Section 3.16 Release of Mortgage Files. (a) Upon the payment in full

of any Mortgage Loan, or the receipt by a Servicer of a notification that payment in full shall be escrowed in a manner customary for such purposes, such Servicer will, on or before the last day of the month in which such payment in full occurs, notify the Trustee by a certification (which certification shall include a statement to the effect that all amounts received or to be received in connection with such payment which are required to be deposited in the related Collection Account pursuant to Section 3.10 have been or will be so deposited) of a Servicing Officer and shall request delivery to it of the Custodial File by submitting a Request for Release to the Trustee. Upon receipt of such certification and Request for Release, the Trustee shall promptly release the related Custodial File to such Servicer within two (2) Business Days. No expenses incurred in connection with any instrument of satisfaction or deed of reconveyance shall be chargeable to the related Collection Account.

(b) From time to time and as appropriate for the servicing or foreclosure of any Mortgage Loan, including, for this purpose, collection under any Insurance Policy relating to the Mortgage Loans, the Trustee shall, upon request of such Servicer and delivery to the Trustee of a Request for Release, release the related Custodial File to such Servicer, and the Trustee shall, at the direction of such Servicer, execute such documents as shall be necessary to the prosecution of any such proceedings and the Servicer shall retain the Mortgage File in trust for the benefit of the Trustee. Such Request for Release shall obligate the applicable Servicer to return each and every document previously requested from the Custodial File to the Trustee when the need therefor by such Servicer no longer exists, unless the Mortgage Loan has been charged-off or liquidated and the Liquidation Proceeds relating to the Mortgage Loan have been deposited in the related Collection Account or the Mortgage File or such document has been delivered to an attorney, or to a public trustee or other public official as required by law, for purposes of initiating or pursuing legal action or other proceedings for the foreclosure of the Mortgaged Property either judicially or non-judicially, and such Servicer has delivered to the Trustee a certificate of a Servicing Officer certifying as to the name and address of the Person to which such Mortgage File or such document was delivered and the purpose or purposes of such delivery. Upon receipt of a certificate of a Servicing Officer stating that such Mortgage Loan was charged-off or liquidated and that all amounts received or to be received in connection with such liquidation that are required to be deposited into the related Collection Account have been so deposited, or that such Mortgage Loan has become an REO Property, a copy of the Request for Release shall be released by the Trustee to the applicable Servicer or its designee upon request therefor. Upon receipt of a Request for Release under this Section 3.16, the Trustee shall deliver the related Custodial File to the requesting Servicer by regular mail, unless such Servicer requests that the Trustee deliver such Custodial File to such Servicer by overnight courier (in which case such delivery shall be at such Servicer's expense); provided, however, that in the event the Servicer has not previously received copies of the relevant Mortgage Loan Documents necessary to service the related Mortgage Loan in accordance with Accepted Servicing Practices, the applicable Responsible Party shall reimburse the applicable Servicer for any overnight courier charges incurred for the requested Custodial Files.

Upon written certification of a Servicing Officer, the Trustee shall execute and deliver to the applicable Servicer copies of any court pleadings, requests for trustee's sale or other documents reasonably necessary to the foreclosure or trustee's sale in respect of a Mortgaged Property or to any legal action brought to obtain judgment against any Mortgagor on the Mortgage Note or Mortgage or to obtain a deficiency judgment, or to enforce any other remedies or rights provided by the Mortgage Note or Mortgage or otherwise available at law or in equity, or shall exercise and deliver to such Servicer a power of attorney sufficient to authorize such Servicer to execute such documents on its behalf. Each such certification shall include a request that such pleadings or documents be executed by the Trustee and a statement as to the reason such documents or pleadings are required and that the execution and delivery thereof by the Trustee will not invalidate or otherwise affect the lien of the Mortgage, except for the termination of such a lien upon completion of the foreclosure or trustee's sale.

Section 3.17 Title, Conservation and Disposition of REO Property. (a) This Section shall apply only to REO Properties acquired for the account of the Trustee and shall not apply to any REO Property relating to a Mortgage Loan which was purchased or repurchased from the Trustee pursuant to any provision hereof. In the event that title to any such REO Property is acquired, the applicable Servicer shall cause the deed or certificate of sale to be issued in the name of the Trustee, on behalf of the Certificateholders. Upon written request by the applicable Servicer, the Trustee shall provide such Servicer with a power of attorney prepared by such Servicer with respect to such REO Property.

(b) Each Servicer shall manage, conserve, protect and operate each REO Property for the Trustee solely for the purpose of its prompt disposition and sale. Each Servicer, either itself or through an agent selected by such Servicer, shall manage, conserve, protect and operate the REO Property in the same manner that it manages, conserves, protects and operates other foreclosed property for its own account, and in the same manner that similar property in the same locality as the REO Property is managed. Each Servicer shall attempt to sell the same (and may temporarily rent the same for a period not greater than one year, except as otherwise provided below) on such terms and conditions as such Servicer deems to be in the best interest of the Trustee. The Trustee shall have no obligations with respect to any REO Dispositions.

(c) Each Servicer shall segregate and hold all funds collected and received in connection with the operation of any REO Property separate and apart from its own funds and general assets and shall deposit such funds in the related Collection Account.

(d) Each Servicer shall deposit net of reimbursement to such Servicer for any related outstanding Servicing Advances and unpaid Servicing Fees provided in Section 3.11, or cause to be deposited, on a daily basis in the related Collection Account all revenues received with respect to the related REO Property and shall withdraw therefrom funds necessary for the proper operation, management and maintenance of the REO Property.

(e) Each Servicer, upon an REO Disposition, shall be entitled to reimbursement for any related unreimbursed Servicing Advances as well as any unpaid Servicing Fees from proceeds received in connection with the REO Disposition, as further provided in Section 3.11.

(f) Any net proceeds from an REO Disposition which are in excess of the unpaid principal balance of the related Mortgage Loan, plus all unpaid REO Imputed Interest thereon through the date of the REO Disposition, shall be retained by the applicable Servicer as additional servicing compensation.

(g) Each Servicer shall use its reasonable best efforts to sell, or cause its Subservicer to sell, in accordance with Accepted Servicing Practices, any REO Property serviced by such Servicer or Subservicer as soon as possible, but in no event later than the conclusion of the third calendar year beginning after the year of its acquisition by the Lower Tier REMIC unless (i) such Servicer applies for an extension of such period from the Internal Revenue Service pursuant to the REMIC Provisions and Code Section 856(e)(3), in which event such REO Property shall be sold within the applicable extension period, or (ii) such Servicer obtains for the Trustee an Opinion of Counsel, addressed to the Depositor, the Trustee and such Servicer, to the effect that the holding by the Lower Tier REMIC of such REO Property subsequent to such period will not result in the imposition of taxes on "prohibited transactions" as defined in Section 860F of the Code or cause the Lower Tier REMIC or Upper Tier REMIC to fail to qualify as a REMIC under the REMIC Provisions or comparable provisions of relevant state laws at any time. Each Servicer shall manage, conserve, protect and operate each REO Property serviced by such Servicer for the Trustee solely for the purpose of its prompt disposition and sale in a manner which does not cause such REO Property to fail to qualify as "foreclosure property" within the meaning of Section 860G(a)(8) or result in the receipt by the Lower Tier REMIC of any "income from non-permitted assets" within the meaning of Section

860F(a)(2)(B) of the Code or any "net income from foreclosure property" which is subject to taxation under Section 860G(a)(1) of the Code. Pursuant to its efforts to sell such REO Property, the applicable Servicer shall either itself or through an agent selected by such Servicer protect and conserve such REO Property in the same manner and to such extent as is customary in the locality where such REO Property is located and may, incident to its conservation and protection of the interests of the Trustee on behalf of the Certificateholders, rent the same, or any part thereof, as such Servicer deems to be in the best interest of the Trustee on behalf of the Certificateholders for the period prior to the sale of such REO Property; provided, however, that any rent received or accrued with respect to such REO Property qualifies as "rents from real property" as defined in Section 856(d) of the Code.

Section 3.18 Notification of Adjustments. With respect to each Adjustable Rate Mortgage Loan, the applicable Servicer shall adjust the Mortgage Rate on the related Adjustment Date and shall adjust the Scheduled Payment on the related mortgage payment adjustment date, if applicable, in compliance with the requirements of applicable law and the related Mortgage and Mortgage Note. In the event that an Index becomes unavailable or otherwise unpublished, the applicable Servicer shall select a comparable alternative index over which it has no direct control and which is readily verifiable. Each Servicer shall execute and deliver any and all necessary notices required under applicable law and the terms of the related Mortgage Note and Mortgage regarding the Mortgage Rate and Scheduled Payment adjustments. Each Servicer shall promptly, upon written request therefor, deliver to the Trustee such notifications and any additional applicable data regarding such adjustments and the methods used to calculate and implement such adjustments. Upon the discovery by a Servicer or the receipt of notice from the Trustee that a Servicer has failed to adjust a Mortgage Rate or Scheduled Payment in accordance with the terms of the related Mortgage Note, such Servicer shall deposit in the related Collection Account from its own funds the amount of any interest loss caused as such interest loss occurs.

Section 3.19 Access to Certain Documentation and Information Regarding the Mortgage Loans. The applicable Servicer shall provide, or cause the Subservicer to provide, to the Depositor, the Trustee, the OTS or the FDIC and the examiners and supervisory agents thereof, access to the documentation regarding the Mortgage Loans in its possession required by applicable regulations of the OTS. Such access shall be afforded without charge, but only upon five (5) Business Days' prior written request and during normal business hours at the offices of the applicable Servicer, the Depositor, the Trustee or any Subservicer. Nothing in this Section shall derogate from the obligation of any such party to observe any applicable law prohibiting disclosure of information regarding the Mortgagors and the failure of any such party to provide access as provided in this Section as a result of such obligation shall not constitute a breach of this Section.

Section 3.20 Documents, Records and Funds in Possession of the Servicers to Be Held for the Trustee. Each Servicer shall account fully to the Trustee for any funds received by such Servicer or which otherwise are collected by such Servicer as Liquidation Proceeds, Condemnation Proceeds or Insurance Proceeds in respect of any Mortgage Loan serviced by such Servicer. All Mortgage Files and funds collected or held by, or under the control of, the Servicer in respect of any Mortgage Loans, whether from the collection of principal and interest payments or from Liquidation Proceeds, including, but not limited to, any funds on deposit in its Collection Account, shall be held by such Servicer for and on behalf of the Trustee and shall be and remain the sole and exclusive property of the Trustee, subject to the applicable provisions of this Agreement. Each Servicer also agrees that it shall not create, incur or subject any Mortgage File or any funds that are deposited in any Collection Account, the Distribution Account or any Escrow Account, or any funds that otherwise are or may become due or payable to the Trustee for the benefit of the Certificateholders, to any claim, lien, security interest, judgment, levy, writ of attachment or other encumbrance, or assert by legal action or otherwise any claim or right of setoff against any Mortgage File or any funds collected on, or

in connection with, a Mortgage Loan, except, however, that such Servicer shall be entitled to set off against and deduct from any such funds any amounts that are properly due and payable to such Servicer under this Agreement.

Section 3.21 Servicing Compensation. (a) As compensation for its activities hereunder, each Servicer shall, with respect to each Mortgage Loan serviced by it, be entitled to retain from deposits to its Collection Account and from Liquidation Proceeds, Condemnation Proceeds, Insurance Proceeds and REO Proceeds related to such Mortgage Loan, the Servicing Fee with respect to each Mortgage Loan (less any portion of such amounts retained by any Subservicer). In addition, each Servicer shall be entitled to recover unpaid Servicing Fees out of related late collections to the extent permitted in Section 3.11. The right to receive the Servicing Fee may not be transferred in whole or in part except in connection with the transfer of all of a Servicer's responsibilities and obligations under this Agreement; provided, however, that each Servicer may pay from the Servicing Fee any amounts due to a Subservicer pursuant to a Subservicing Agreement entered into under Section 3.02.

(b) Additional servicing compensation in the form of assumption or modification fees, late payment charges, NSF fees, reconveyance fees and other similar fees and charges (other than Prepayment Charges) shall be retained by a Servicer only to the extent such fees or charges are received by such Servicer. Each Servicer shall also be entitled pursuant to Section 3.11(a)(iv) to withdraw from the related Collection Account, and pursuant to Section 3.07(e), to direct the Trustee to withdraw from the Distribution Account and remit to the applicable Servicer (except for monies invested during the Trustee Float Period), as additional servicing compensation, interest or other income earned on the related portions of deposits therein. HomEq shall also be entitled to retain net Prepayment Interest Excesses (to the extent not required to offset Prepayment Interest Shortfalls), but only to the extent such amounts are received by HomEq.

(c) Each Servicer shall be required to pay all expenses incurred by it in connection with its servicing activities hereunder (including payment of premiums for any blanket policy insuring against hazard losses pursuant to Section 3.13, servicing compensation of the Subservicer to the extent not retained by it and the fees and expenses of independent accountants and any agents appointed by such Servicer), and shall not be entitled to reimbursement therefor from the Trust Fund except as specifically provided in Section 3.11.

Section 3.22 Annual Statement as to Compliance. Each Servicer will deliver or cause to be delivered to the Depositor, the Rating Agencies and the Trustee on or before March 15th of each calendar year, commencing in 2006, an Officer's Certificate stating, as to each signatory thereof, that (i) a review of the activities of such Servicer during the preceding calendar year and of performance under this Agreement or a similar agreement has been made under such officers' supervision, and (ii) to the best of such officers' knowledge, based on such review, such Servicer has fulfilled all of its obligations under this Agreement throughout such year, or, if there has been a default in the fulfillment of any such obligation, specifying each such default known to such officers and the nature and status thereof. Promptly after receipt of such Officer's Certificate, the Depositor shall review such Officer's Certificate and, if applicable, consult with the applicable Servicer as to the nature of any defaults by the Servicer in the fulfillment of any of the Servicer's obligations. The obligations of a Servicer under this Section apply to each Servicer that serviced during the applicable period, whether or not such Servicer is acting as a Servicer at the time such Officer's Certificate is required to be delivered.

Section 3.23 Annual Independent Public Accountants' Servicing Statement; Financial Statements. Not later than March 15th of each calendar year commencing in 2006, each Servicer, at its expense, shall cause a nationally recognized firm of independent certified public accountants to furnish to the Depositor, the Rating Agencies and the Trustee a report stating that (i) it has obtained a letter of representation regarding certain matters from the

management of such Servicer which includes an assertion that such Servicer has complied with certain minimum residential mortgage loan servicing standards, identified in the Uniform Single Attestation Program for Mortgage Bankers established by the Mortgage Bankers Association of America, with respect to the servicing of residential mortgage loans during the most recently completed calendar year and (ii) on the basis of an examination conducted by such firm in accordance with standards established by the American Institute of Certified Public Accountants, such representation is fairly stated in all material respects, subject to such exceptions and other qualifications that may be appropriate. In rendering its report such firm may rely, as to matters relating to the direct servicing of residential mortgage loans by Subservicers, upon comparable reports of firms of independent certified public accountants rendered on the basis of examinations conducted in accordance with the same standards (rendered within one year of such report) with respect to those Subservicers. Promptly after receipt of such report, the Depositor shall review such report and, if applicable, consult with the applicable Servicer as to the nature of any defaults by such Servicer in the fulfillment of any of the Servicer's obligations. The obligations of a Servicer under this Section apply to each Servicer that serviced during the applicable period, whether or not such Servicer is acting as a Servicer at the time such report is required to be delivered.

Section 3.24 Trustee to Act as Servicer. (a) Subject to Section 7.02, in the event that any Servicer shall for any reason no longer be a Servicer hereunder (including by reason of an Event of Default), the Trustee or its successor shall thereupon assume all of the rights and obligations of such Servicer hereunder arising thereafter (except that the Trustee shall not be (i) liable for losses of such predecessor Servicer pursuant to Section 3.10 or any acts or omissions of such predecessor Servicer hereunder), (ii) obligated to effectuate repurchases or substitutions of Mortgage Loans hereunder, including but not limited to repurchases or substitutions pursuant to Section 2.03, (iii) responsible for expenses of such predecessor Servicer pursuant to Section 2.03 or (iv) deemed to have made any representations and warranties of such Servicer hereunder. Any such assumption shall be subject to Section 7.02.

(b) Every Subservicing Agreement entered into by a Servicer shall contain a provision giving the successor Servicer the option to terminate such agreement in the event a successor Servicer is appointed.

(c) If any Servicer shall for any reason no longer be a Servicer (including by reason of any Event of Default), the Trustee (or any other successor Servicer) may, at its option, succeed to any rights and obligations of such Servicer under any Subservicing Agreement in accordance with the terms thereof; provided that the Trustee (or any other successor Servicer) shall not incur any liability or have any obligations in its capacity as successor Servicer under a Subservicing Agreement arising prior to the date of such succession unless it expressly elects to succeed to the rights and obligations of such Servicer thereunder; and such Servicer shall not thereby be relieved of any liability or obligations under the Subservicing Agreement arising prior to the date of such succession.

(d) The applicable Servicer shall, upon request of the Trustee, but at the expense of such Servicer, deliver to the assuming party all documents and records relating to each Subservicing Agreement (if any) to which it is party and the Mortgage Loans then being serviced thereunder and an accounting of amounts collected and held by it and otherwise use its best efforts to effect the orderly and efficient transfer of such Subservicing Agreement to the assuming party.

Section 3.25 Compensating Interest. Each Servicer shall remit to the Trustee on each Remittance Date an amount from its own funds equal to the Compensating Interest payable by such Servicer for the related Distribution Date.

Section 3.26 Credit Reporting; Gramm-Leach-Bliley Act. (a) With

respect to each Mortgage Loan, each Servicer agrees to fully furnish, in accordance with the Fair Credit Reporting Act and its implementing regulations, accurate and complete information (e.g., favorable and unfavorable) on its borrower credit files to Equifax, Experian and TransUnion Credit Information Company (three of the credit repositories), on a monthly basis.

(b) Each Servicer shall comply with Title V of the Gramm-Leach-Bliley Act of 1999 and all applicable regulations promulgated thereunder, relating to the Mortgage Loans required to be serviced by it and the related borrowers and shall provide all required notices thereunder.

ARTICLE IV

DISTRIBUTIONS AND
ADVANCES BY THE SERVICERS

Section 4.01 Advances. (a) The amount of P&I Advances to be made by each Servicer for any Remittance Date shall equal, subject to Section 4.01(c), the sum of (i) the aggregate amount of Scheduled Payments (with each interest portion thereof net of the related Servicing Fee), due during the Due Period immediately preceding such Remittance Date in respect of the Mortgage Loans serviced by such Servicer, which Scheduled Payments were not received as of the close of business on the related Determination Date (provided, however, that with respect to any Balloon Loan that is delinquent on its maturity date, the Servicer will not be required to advance the principal portion of the related balloon payment but will be required to continue to make P&I Advances in accordance with this Section 4.01(a) with respect to such Balloon Loan in an amount equal to the assumed scheduled interest that would otherwise be due based on the original amortization schedule for such Balloon Loan (with interest at the Adjusted Net Mortgage Rate)), plus (ii) with respect to each REO Property serviced by such Servicer, which REO Property was acquired during or prior to the related Prepayment Period and as to which such REO Property an REO Disposition did not occur during the related Prepayment Period, an amount equal to the excess, if any, of the Scheduled Payments (with each interest portion thereof net of the related Servicing Fee) that would have been due on the related Due Date in respect of the related Mortgage Loans, over the net income from such REO Property transferred to the related Collection Account for distribution on such Remittance Date.

(b) On each Remittance Date, each Servicer shall remit in immediately available funds to the Trustee an amount equal to the aggregate amount of P&I Advances, if any, to be made in respect of the Mortgage Loans and REO Properties serviced by such Servicer for the related Remittance Date either (i) from its own funds or (ii) from the related Collection Account, to the extent of funds held therein for future distribution (in which case, it will cause to be made an appropriate entry in the records of the related Collection Account that Amounts Held for Future Distribution have been, as permitted by this Section 4.01, used by such Servicer in discharge of any such P&I Advance) or (iii) in the form of any combination of (i) and (ii) aggregating the total amount of P&I Advances to be made by such Servicer with respect to such Mortgage Loans and REO Properties. Any Amounts Held for Future Distribution and so used shall be appropriately reflected in such Servicer's records and replaced by such Servicer by deposit in the related Collection Account on or before any future Remittance Date to the extent required.

(c) The obligation of each Servicer to make such P&I Advances is mandatory, notwithstanding any other provision of this Agreement but subject to paragraph (d) below, and, with respect to any Mortgage Loan or REO Property, shall continue until a Final Recovery Determination in connection therewith or the removal thereof from coverage under this Agreement, except as otherwise provided in this Section.

(d) Notwithstanding anything herein to the contrary, no P&I Advance or Servicing Advance shall be required to be made hereunder by any Servicer if such P&I Advance or Servicing Advance would, if made, constitute a

Mortgage Servicing - Examination Procedures

After completing the risk assessment and examination scoping, examiners should use these procedures, in conjunction with the compliance management system review procedures, to conduct a mortgage servicing examination. The examination procedures contain a series of modules, grouping similar requirements together. Depending on the scope, each examination will cover one or more of the following modules:

Routine Servicing

Module 1 Servicing Transfers, Loan Ownership Transfers, and Escrow Disclosures
Module 2 Payment Processing and Account Maintenance
Module 3 Customer Inquiries and Complaints
Module 4 Maintenance of Escrow Accounts and Insurance Products
Module 5 Credit Reporting
Module 6 Information Sharing and Privacy

Default Servicing

Module 7 Collections and Accounts in Bankruptcy
Module 8 Loss Mitigation

Foreclosure

Module 9 Foreclosures

Examination Objectives

1. To assess the quality of the regulated entity's compliance risk management systems, including internal controls and policies and procedures, for preventing violations of federal consumer financial law in its mortgage servicing business.
2. To identify acts or practices that materially increase the risk of violations of federal consumer financial law in connection with mortgage servicing.
3. To gather facts that help determine whether a regulated entity engages in acts or practices that are likely to violate federal consumer financial law in connection with mortgage servicing.
4. To determine, in consultation with Headquarters, whether a violation of a federal consumer financial law has occurred and whether further supervisory or enforcement actions are appropriate.

Background

A servicer may service loans on behalf of itself or an affiliate. It may service as a contractor of the trustee where a mortgage is included in a mortgage-backed security, or it may service whole loans for an outside third-party investor.[1] A servicer may sell the rights to service the loan separately from any ownership transfers. This is because some entities have expertise in payment processing and other servicing responsibilities, while others seek to invest in the underlying mortgages. These procedures apply whether the servicer obtained the servicing rights from another entity or the servicing responsibility is transferred within a company from the origination platform to the servicing platform.

Servicers must comply with various laws to the extent that the law applies to the particular servicer and its activities:

- The Real Estate Settlement Procedures Act (RESPA) and its implementing regulation, Regulation X, impose requirements for servicing transfers, written consumer inquiries, and escrow account maintenance.

- The Truth in Lending Act (TILA) and its implementing regulation, Regulation Z, generally impose requirements on owners for home mortgage ownership transfers. It also imposes requirements on servicers regarding crediting of payments, imposition of late fee and delinquency charges, and provision of payoff statements with respect to closed-end consumer credit transactions secured by a principal dwelling. For open-end mortgages,

Regulation Z provisions related to payment crediting and error resolution apply to the extent that the servicer is a creditor.

- The Electronic Funds Transfer Act (EFTA) and its implementing regulation, Regulation E, impose requirements if servicers within the scope of coverage obtain electronic payments from borrowers.
- The Fair Debt Collection Practices Act (FDCPA) governs collection activities conducted by third-party collection agencies, as well as servicer collection activities if the servicer acquired the loan when it was already in default.
- The Homeowners Protection Act (HPA) limits private mortgage insurance that can be assessed on customer accounts.
- The Fair Credit Reporting Act (FCRA) requires servicers that furnish information to consumer reporting agencies to ensure the accuracy of data placed in the consumer reporting system. The FCRA also limits certain information sharing between company affiliates.
- The Gramm-Leach-Bliley Act (GLBA) requires servicers within the scope of coverage to provide privacy notices and limit information sharing in particular ways.
- The Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B, apply to those servicers that are creditors, such as those who participate in a credit decision about whether to approve a mortgage loan modification. The statute makes it unlawful to discriminate against any borrower with respect to any aspect of a credit transaction:
    - On the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
    - Because all or part of the applicant's income derives from any public assistance program; or
    - Because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[2]

To carry out the objectives set forth in the **Examination Objectives** section, the examination process also will include assessing other risks to consumers that are not governed by specific statutory or regulatory provisions. These risks may include potentially unfair, deceptive, or abusive acts or practices (UDAAPs) with respect to servicers' interactions with consumers.[3]

Collecting information about risks to consumers, whether or not there are specific legal guidelines addressing such risks, can help inform the Bureau's policymaking. The standards the CFPB will use in assessing UDAAPs are:

- A representation, omission, act, or practice is deceptive when:

  (1) the representation, omission, act, or practice misleads or is likely to mislead the consumer;
  (2) the consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and
  (3) the misleading representation, omission, act, or practice is material.

- An act or practice is unfair when:

  (1) it causes or is likely to cause substantial injury to consumers,
  (2) the injury is not reasonably avoidable by consumers, and
  (3) the injury is not outweighed by countervailing benefits to consumers or to competition.

- An abusive act or practice:

  (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or
  (2) takes unreasonable advantage of –

  - a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

  - the inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or

  - the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

Please refer to the examination procedures regarding UDAAPs for more information about the legal standards and the CFPB's approach to examining for UDAAPs.

The particular facts in a case are crucial to a determination of unfair, deceptive, or abusive practices. As set out in the **Examination Objectives** section, examiners should consult with Headquarters to determine whether the applicable legal standards have been met before a violation of any federal consumer financial law could be cited, including a UDAAP violation.

Aug 10 2012

Putting the 'service' back in 'mortgage servicing'

BY DAVID SILBERMAN

Today, we're proposing new mortgage servicing rules.

So, what's mortgage servicing and why does it need the new rules?

The short answer is that mortgage servicing is the processing of mortgage payments. That may sound simple, but as many borrowers have learned in the aftermath to the financial crisis, it can get complicated very quickly.

When you make a mortgage payment, part of that pays interest on the money that you borrowed, and part of that actually repays the money that you borrowed. Often the company that owns your mortgage hires someone else – a servicer – to collect and apply these payments, along with handling other day-to-day responsibilities in administering the loan.

This can be a challenge due to sophisticated mortgage products, partial payments, delinquent borrowers, fees, errors and misunderstandings. And when consumers can't make their mortgage payments, servicers are the ones that decide what to do. As we saw during the recession, not all servicers were prepared to handle these challenges. And that can have very bad consequences for consumers.

Why are you proposing new rules?

When an agency writes a new rule, that rule must first be proposed, and the public has an

opportunity to comment on it. After we get your comments we'll review them and consider them while we're writing the final rule.

How did you arrive at these rules?

Several of them are required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (which we call the Dodd-Frank Act for short). We developed others in response to issues in the marketplace. To do this, we have spent a lot of that time talking to the public because we want to write rules that work. For us, rules that work are rules that protect consumers, are consistent with other rules that apply to servicers, recognize the impact on lenders and mortgage investors, and do not cause unnecessary burden on industry. So, in addition to meeting with consumers, consumer advocates, servicers, trade associations, and mortgage investors, we worked with a design team, conducted consumer testing , and met with small servicers to develop these proposals.

What are the new rules?

We are proposing rules on mortgage servicing to implement new laws in the Dodd-Frank Act. Our proposals have new rules that are designed to put the service back in mortgage servicing, and will benefit borrowers by eliminating surprises and run-arounds. The rules are divided into two proposals – one to amend the regulations in the Truth in Lending Act (Regulation Z) and the other to amend the regulations in the Real Estate Settlement Procedures Act (Regulation X). The rules are:

- **Monthly mortgage statements**
  Servicers would be required to provide clear billing statements including information on the loan, amount due, and application of past payments.
- **Warnings before interest rate adjustments**
  Servicers would be required to provide consumers with a new notice 6 to 7 months before the first rate adjustment, as well as earlier and improved notices before rate adjustments causing an increase in a consumer's mortgage payments.
- **Force-placed insurance**
  Servicers can only charge borrowers for buying insurance on the property when they have a reasonable basis to believe that the borrowers have let their own insurance lapse and have given borrowers two notices estimating the cost of the "force-placed insurance."
- **Early outreach for delinquent borrowers**
  Getting a delinquent borrower back on track requires early intervention and information about options available.
- **Prompt crediting of payments**
  Payments must be applied as of the day they are received, and the handling of partial payments is clarified.

- **Accurate information management**
  Servicers must have reasonable policies to ensure that when borrowers provide documents and information the servicers can find and use them.
- **Error resolution and information requests**
  Mistakes happen, but they need to get fixed. Servicers must address borrower concerns about possible errors within certain timeframes and provide the information they request.
- **Direct and ongoing access to servicer personnel**
  Delinquent borrowers will be able to contact the right people at their servicer to get information and take steps to avoid foreclosure.
- **Evaluation for alternatives to foreclosure**
  Servicers would be required to appropriately review borrower applications for loan modifications or other options to avoid foreclosure.

How can I get involved?

We want your comments by October 9 – here's how to weigh in:

- Read a summary of these proposals or the whole Truth in Lending Act proposal and the whole Real Estate Settlement Procedures Act proposal, and either:
- Participate in the formal comment process by going to Regulations.gov (TILA Servicing or RESPA servicing) to send us your comments, or
- Visit our partner, the Cornell e-Rulemaking Initiative, to read other summaries of the rules on www.regulationroom.org and participate in an on-line conversation about them. Cornell will share with us a summary of the feedback that you and others provide.

12 Comments | Categories: Mortgages

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ORIGINAL

11-0908

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

SONDRA ANDERSON,

Plaintiff,

v.

BARCLAYS CAPITAL REAL ESTATE INC. d.b.a. HOMEQ SERVICING,

Defendant.

Case No. 3:09-cv-02335-JGC
Judge James G. Carr

CERTIFICATION ORDER

Pursuant to Rule 18 of the Rules of Practice of the Supreme Court of Ohio, the undersigned District Judge of the United States District Court for the Northern District of Ohio, Western Division, hereby certifies questions of state law to the Supreme Court of Ohio. No controlling precedent of the Supreme Court of Ohio answers these questions, which are potentially dispositive of the above-captioned case.[1] For the reasons explained in more detail below, the Court requests the Supreme Court of Ohio answer the certified questions of state law set forth in this Certification Order.

NAME OF THE CASE

The name of the case is Sondra Anderson v. Barclays Capital Real Estate Inc. d.b.a. HomEq Servicing, No. 3:09-cv-02335-JGC.

[1] Judge Jack Zouhary, also of the United States District Court for the Northern District of Ohio, Western Division, is simultaneously certifying to the Supreme Court of Ohio similar questions in two consolidated cases: State of Ohio, ex rel. Michael DeWine, Attorney General of Ohio v. GMAC Mortgage, LLC and Jeffrey Stephan, No. 3:10-cv-02537-JZ; and Lois M. Blank, William H. Stroble, Brandon Ritze and Blair Ritze, and Rebecca Lawson v. GMAC Mortgage, LLC and Ally Financial, Inc., No. 1:10-cv-02709-JZ.

STATEMENT OF FACTS AND CIRCUMSTANCES FROM WHICH THE QUESTIONS OF LAW ARISE

The above-captioned case raises questions of (1) whether "mortgage servicers" are "suppliers" under the CSPA and (2) whether "mortgage servicing" is a "consumer transaction" under the CSPA.

The CSPA, at O.R.C. § 1345.01(C), defines a "supplier" as:

> a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. If the consumer transaction is in connection with a residential mortgage, "supplier" does not include an assignee or purchaser of the loan for value, except as otherwise provided in section 1345.091 of the Revised Code. For purposes of this division, in a consumer transaction in connection with a residential mortgage, "seller" means a loan officer, mortgage broker, or nonbank mortgage lender.

The CSPA, at O.R.C. § 1345.01(A), defines a "consumer transaction" as:

> a sale, lease assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, except for transactions involving a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code and transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.

Barclays Capital Real Estate Inc. d.b.a. HomEq Servicing ("HomEq") is a "mortgage servicer" engaging in the business of servicing residential mortgages of individuals for personal, family, or household purposes that at some point during the term of such loans begins servicing such individual loans. HomEq is not a bank, financial institution, or any entity defined in O.R.C. § 5725.01. It is alleged that HomEq:

- accepts, applies and distributes mortgage loan payments and other fees, penalties and

assessments, and in connection with so doing exercises discretion regarding the fees charged or applied to a particular mortgage loan account (Second Amended Complaint ("SAC"), ECF Doc. No. 35, ¶ 71(a));

- maintains customer service departments and call centers to which Ohio residents with loans being serviced by HomEq are directed to call with questions, concerns about their mortgage loans (SAC ¶ 71(b));
- directs customers who are in default or danger of default to contact it for options concerning loss mitigation or loan modification and further holds itself out as having authority to make substantive decisions regarding which customers, if any, will receive loan modification agreements or loss mitigation assistance (SAC ¶ 71(c));
- handles consumer disputes regarding their mortgage loans (SAC ¶ 71(d));
- negotiates and executes loan modification, forbearance and other agreements directly with customers (SAC ¶ 71(e));
- purchases homeowner's insurance on behalf of, and at the expense of, consumers who HomEq believes not to have purchased insurance required by the note and mortgage (SAC ¶ 71(f));
- makes customer service related promises on its website to which consumers are directed by the servicer (SAC ¶ 72 n.7); and
- receives payment for its loan administration and other services from the payment stream generated by the consumers' residential mortgages (SAC ¶ 71(g)).

QUESTIONS OF LAW TO BE ANSWERED

This Court has determined that the interpretation of Ohio Rev. Code § 1345.01(A) & (C), effective December 28, 2009, may be determinative of this proceeding, and that there is no

controlling precedent on this issue in the decisions of the Supreme Court of Ohio. Therefore, pursuant to Rule 18 of the Rules of Practice of the Supreme Court of Ohio, this Court certifies the following questions to the Supreme Court of Ohio:

(1) Does the servicing of a borrower's residential mortgage loan constitute a "consumer transaction" as defined in the Ohio Consumer Sales Practices Act, O.R.C. § 1345.01(A)?

(2) Are entities that service residential mortgage loans "suppliers ... engaged in the business of effecting or soliciting consumer transactions" within the meaning of the Ohio Consumer Sales Practices Act, O.R.C. § 1345.01(C)?

NAMES OF PARTIES

The names of the parties are: (a) Plaintiff Sondra Anderson; (b) Defendant Barclays Capital Real Estate Inc. d.b.a. HomEq Servicing; and (c) Amici Curiae State of Ohio and Ohio Attorney General Michael DeWine.

NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF COUNSEL

The names, addresses, and telephone numbers of counsel for each party as are follows.

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DESIGNATION OF MOVING PARTY

Defendant Barclays Capital Real Estate Inc. d.b.a. HomEq Servicing is hereby designated as the Moving Party. The Court designates HomEq as the Moving Party because HomEq moved to dismiss Plaintiff's CSPA-based claims on the grounds that HomEq is not a "supplier . . .

engaged in the business of effecting or soliciting consumer transactions" under the CSPA.

The Clerk of the United States District Court for the Northern District of Ohio, Western Division, is directed to serve copies of this Certification Order upon counsel for the parties and to file this Certification Order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

IT IS SO ORDERED.

JAMES G. CARR
U. S. DISTRICT JUDGE
May 24, 2011

May 24, 2011

Clerk of Court
Supreme Court of Ohio
30 East Broad Street
Columbus, Ohio 43266-0419

Dear Clerk,

Please find enclosed a certified copy of Judge James G. Carr's order filed on May 24, 2011, and a certified copy of the docket. Judge Carr certified to the Supreme Court questions of law in the follow case:

3:09CV2335 Sondra Anderson v. Barclays Capital Real Estate, Inc.

If you have any questions or need additional information, please feel free to contact me at (419) 213-5560. Thank you for your assistance.

Sincerely,

Amy L. Schroeder
Courtroom Deputy to
Judge James G. Carr

Encl.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CERTIFICATE OF SERVICE

3:09CV2335

In re: Sondra Anderson. v. Barclays Capital Real Estate, Inc.

This is to certify that copies of the foregoing Order Certifying Question of State Law to the Supreme Court of Ohio was filed electronically on the 24th day of May, 2011, to all counsel of record listed below:

John T. Murray, Susan A. Choe, James D. Curphey, Leslie O. Murray, Megan E. Bailey, Michael J. Stewart, Michael A. Wehrkamp, Jeffrey R. Loeser, Benjamin B. Klubes, Victoria Holstein-Childress

Geri M. Smith, Clerk of Court
Northern District of Ohio

s/ Dianne Gowing
Deputy Clerk

Toledo, Ohio

As Introduced

129th General Assembly
Regular Session
2011-2012

S. B. No. 14

Senator Skindell

A BILL

To amend sections 109.572, 1181.05, 1181.21, and 1321.52 and to enact sections 1323.01 to 1323.20 and 1323.99 of the Revised Code to require registration of residential mortgage servicers, to regulate residential mortgage servicers, and to adopt civil and criminal penalties for violations of the bill's provisions.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 109.572, 1181.05, 1181.21, and 1321.52 be amended and sections 1323.01, 1323.02, 1323.03, 1323.04, 1323.05, 1323.06, 1323.07, 1323.08, 1323.09, 1323.10, 1323.11, 1323.12, 1323.13, 1323.14, 1323.15, 1323.16, 1323.17, 1323.18, 1323.19, 1323.20, and 1323.99 of the Revised Code be enacted to read as follows:

Sec. 109.572. (A)(1) Upon receipt of a request pursuant to section 121.08, 3301.32, 3301.541, or 3319.39 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner

(B) The requirements set forth in this section are in addition to any other requirement set forth in federal or state law regulating the conduct of collection activities, including the Federal Fair Debt Collection Practices Act, 91 Stat. 874 (1977), 15 U.S.C. 1692 et seq.

Sec. 1323.19. (A) No mortgage servicer, in conducting a mortgage servicer business, shall engage in any unfair, deceptive or unconscionable act in violation of Chapter 1345. of the Revised Code. Any violation of the sections set forth in division (C), (D), (F), or (G) of section 1323.15 or section 1323.16, 1323.17, or 1323.18 of the Revised Code is an unfair and deceptive act or practice in violation of section 1345.02 of the Revised Code. The attorney general may take enforcement action and a borrower may seek recovery under Chapter 1345. of the Revised Code for the violations set forth in this division.

(B) A borrower injured by a violation of division (A) of this section may not recover damages, attorney's fees, and costs under Chapter 1345. of the Revised Code if the borrower has recovered damages in a cause of action initiated under section 1323.20 of the Revised Code and the damages sought under Chapter 1345. of the Revised Code are based on the same acts or circumstances as the damages awarded under section 1323.20 of the Revised Code.

Sec. 1323.20. (A) A borrower injured by a violation of this chapter may recover damages in an amount not less than all improper charges or fees paid to the mortgage servicer, plus reasonable attorney's fees and court costs, and also may be awarded punitive damages.

(B) Nothing in this section prevents recovery under division (B) or (C)(2) of section 1323.03 of the Revised Code.

(C) A borrower may not recover damages, attorney's fees, or

As Introduced

129th General Assembly
Regular Session
2011-2012

H. B. No. 187

Representatives Driehaus, Foley

Cosponsors: Representatives Hagan, R., Murray, Letson, Williams, Antonio, Yuko, Boyd, Fedor, Lundy, Ramos, Clyde

A BILL

To amend sections 109.572, 1181.05, 1181.21, and 1321.52 and to enact sections 1323.01 to 1323.20 and 1323.99 of the Revised Code to require registration of residential mortgage servicers, to regulate residential mortgage servicers, and to adopt civil and criminal penalties for violations of the bill's provisions.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 109.572, 1181.05, 1181.21, and 1321.52 be amended and sections 1323.01, 1323.02, 1323.03, 1323.04, 1323.05, 1323.06, 1323.07, 1323.08, 1323.09, 1323.10, 1323.11, 1323.12, 1323.13, 1323.14, 1323.15, 1323.16, 1323.17, 1323.18, 1323.19, 1323.20, and 1323.99 of the Revised Code be enacted to read as follows:

Sec. 109.572. (A)(1) Upon receipt of a request pursuant to section 121.08, 3301.32, 3301.541, or 3319.39 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the

times or times known to be inconvenient, with the intent to annoy, abuse, oppress, or threaten any person at the called number.

(B) The requirements set forth in this section are in addition to any other requirement set forth in federal or state law regulating the conduct of collection activities, including the Federal Fair Debt Collection Practices Act, 91 Stat. 874 (1977), 15 U.S.C. 1692 et seq.

Sec. 1323.19. (A) No mortgage servicer, in conducting a mortgage servicer business, shall engage in any unfair, deceptive or unconscionable act in violation of Chapter 1345. of the Revised Code. Any violation of the sections set forth in division (C), (D), (F), or (G) of section 1323.15 or section 1323.16, 1323.17, or 1323.18 of the Revised Code is an unfair and deceptive act or practice in violation of section 1345.02 of the Revised Code. The attorney general may take enforcement action and a borrower may seek recovery under Chapter 1345. of the Revised Code for the violations set forth in this division.

(B) A borrower injured by a violation of division (A) of this section may not recover damages, attorney's fees, and costs under Chapter 1345. of the Revised Code if the borrower has recovered damages in a cause of action initiated under section 1323.20 of the Revised Code and the damages sought under Chapter 1345. of the Revised Code are based on the same acts or circumstances as the damages awarded under section 1323.20 of the Revised Code.

Sec. 1323.20. (A) A borrower injured by a violation of this chapter may recover damages in an amount not less than all improper charges or fees paid to the mortgage servicer, plus reasonable attorney's fees and court costs, and also may be awarded punitive damages.